

## “WRONG THE DAY IT WAS DECIDED”: *LOCHNER* AND CONSTITUTIONAL HISTORICISM

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INTRODUCTION.....	677
I. <i>LOCHNER</i> IN THE CONSTITUTIONAL CANON.....	680
II. <i>LOCHNER</i> AND CONSTITUTIONAL CHANGE .....	696
III. <i>LOCHNER</i> AND CONSTITUTIONAL ETHOS .....	706
IV. <i>LOCHNER</i> AND CONSTITUTIONAL HISTORICISM.....	711

### INTRODUCTION

“[W]e think *Plessy* [*v. Ferguson*] was wrong the day it was decided,” the Joint Opinion of Justices O’Connor, Kennedy, and Souter declared in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>1</sup> *Plessy*, the Joint Opinion explained, had asserted that state enforced separation of the races had nothing to do with racial oppression, and that the perceived offense was merely the fantasy of hypersensitive blacks.<sup>2</sup> This was simply wrong in 1896, and the claim became even more obviously wrong as the years progressed.<sup>3</sup> Therefore it was completely appropriate for the Court to overrule *Plessy* in 1954 in *Brown v. Board of Education*.<sup>4</sup>

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<sup>1</sup> 505 U.S. 833, 863 (1992) (Joint Op. of O’Connor, Kennedy, and Souter, JJ.). Justice Souter is widely acknowledged to have written this section of the Joint Opinion that dealt with the issues of *stare decisis* and respect for past precedents.

<sup>2</sup> *Id.* at 862 (“The *Plessy* Court considered ‘the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.’”) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896)).

<sup>3</sup> *Id.* at 862-63 (questioning whether the majority of the *Plessy* Court actually believed the stated rationale for its decision and describing how common facts of life later convinced the Court that segregation inherently resulted in unequal treatment of the races).

<sup>4</sup> *Id.* at 862-64; *see also* *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954) (holding *Plessy*’s “separate but equal” doctrine inapplicable “in the field of public education”).

The Joint Opinion did not say quite the same thing about *Lochner v. New York*.<sup>5</sup> In particular, it did not say that *Lochner* was “wrong the day it was decided.” Rather, *Lochner* and its progeny were properly and correctly overruled, the Joint Opinion argued, because *Lochner*’s factual presuppositions about human liberty and unregulated markets had been undermined by subsequent events, in particular the Great Depression.<sup>6</sup> The Joint Opinion differentiated between *Lochner* and *Plessy* by explaining that in the case of *Plessy* an incorrect understanding of the facts about the effects of racial segregation had been corrected between 1896 and 1954,<sup>7</sup> while in the case of *Lochner*, the facts themselves had changed between 1905 and the New Deal.<sup>8</sup>

Until quite recently, most legal academics, not to mention most judges, would have viewed *Lochner* and *Plessy* in similar ways. Both were not only wrong, but wrong the day they were decided; they were central examples of how courts should not decide constitutional cases. *Plessy* still remains in that category. But for an increasing number of legal thinkers, *Lochner* no longer does. For the latter group of academics, as for the authors of the Joint Opinion, if *Lochner* was wrongly decided at all (and some now think that it was not), it was because of something that happened afterwards.

In this essay I want to explore two questions. The first question is why it is so important for us to be able to say about a case from the past that it was “wrong the day it was decided.” What is at stake in making such a claim? Why (and when) do people change their minds about this question, as many appear to have done in the case of *Lochner*, but not (yet) in the case of *Plessy* or, for that matter, *Dred Scott v. Sandford*?<sup>9</sup>

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<sup>5</sup> 198 U.S. 45 (1905) (holding unconstitutional a New York law prescribing maximum work hours for bakers).

<sup>6</sup> 505 U.S. at 861-862. (“[T]he Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* [*v. Children’s Hosp. of D.C.*, 261 U.S. 525 (1923)] rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare.”).

<sup>7</sup> *Id.* at 863 (“Society’s understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896.”).

<sup>8</sup> *Id.* at 862 (“The facts upon which the earlier case [*Lochner*] had premised a constitutional resolution of social controversy had proven to be untrue, and history’s demonstration of their untruth not only justified but required the new choice of constitutional principle that *West Coast Hotel* [*Co. v. Parrish*, 300 U.S. 379 (1937)] announced.”).

<sup>9</sup> 60 U.S. (19 How.) 393 (1857). Attitudes about *Plessy* are undergoing change, see the discussion *infra* notes 145-166 and accompanying text, and Mark Graber has recently argued that *Dred Scott* was probably correctly decided in its own time. MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (forthcoming 2005); Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 273, 315-18 (1997) [hereinafter Graber, *Desperately Ducking*].

But this first question, however interesting in itself, is merely a device for thinking about a second, more complicated question. I am interested in the consequences of what I call a historicist view about constitutional law. Roughly speaking, constitutional historicism holds that the conventions determining what is a good or bad legal argument about the Constitution, what is a plausible legal claim, and what is “off-the-wall” change over time in response to changing social, political, and historical conditions.<sup>10</sup> Although at any point in time legal materials and the internal conventions of constitutional argument genuinely constrain lawyers and judges, these materials and conventions are sufficiently flexible to allow constitutional law to become an important site for political and social struggle. As a result, legal materials and conventions of constitutional argument change in response to the political and social struggles waged through them. The internal norms of good constitutional legal argument are always changing, and they are changed by political, social, and historical forces in ways that the internal norms of legal reasoning do not always directly acknowledge or sufficiently recognize.<sup>11</sup>

I regard myself as a constitutional historicist, and the constitutional law casebook that I co-edit takes a decidedly historicist view about the processes of constitutional decisionmaking – indeed, that is the title of the book.<sup>12</sup> However, if historicism is a viable approach, how is it possible for a historicist to say of a case in the past that it was “wrong the day it was decided?” It might well have been rightly decided, given the assumptions of an earlier era.

In fact, constitutional historicism helps us understand how our own judgments of past cases might be conditioned by our historical circumstances. One reason why we might be so certain that a case from an earlier era was wrongly (or rightly) decided may have less to do with the legal culture of the past and more to do with our current constitutional controversies and our current sense of constitutional correctness. Perhaps *Lochner* must be wrong the day it was decided because of what we need to justify to ourselves about

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*Slavery*] (characterizing the *Dred Scott* decision as “constitutionally plausible” under contemporary constitutional principles and, therefore, concluding that it is futile to use the pro-slavery results of the decision as a means of attacking or supporting any of those theories); cf. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 64 (1991) (“While recognizing *Dred Scott* for the moral evil that it is, the modern judge is perfectly capable of considering that Chief Justice Taney might have had a legally plausible case for his morally notorious decision.”).

<sup>10</sup> For statements of constitutional historicism, see PAUL BREST, SANFORD LEVINSON, J.M. BALKIN & AKHIL REED AMAR, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS*, at xxxi-xxxii (4th ed. 2000); Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore*, 90 GEO. L.J. 173, 174, 181 (2001) [hereinafter Balkin & Levinson, *Legal Historicism*].

<sup>11</sup> BREST, LEVINSON, BALKIN & AMAR, *supra* note 10, at xxxi-xxxii; Balkin & Levinson, *Legal Historicism*, *supra* note 10, at 174, 181.

<sup>12</sup> BREST, LEVINSON, BALKIN & AMAR, *supra* note 10.

the present. If so, then views about *Lochner*'s legal correctness may change over time because lawyers, judges, and legal academics continually face new historical circumstances and must continually integrate new cases into the canon of constitutional law. Making sense of these changes and taking positions about what is correct and incorrect in our own era continually puts famous cases from the past, such as *Lochner v. New York*, in a different light.

If this analysis is correct, however, it poses still deeper questions. If the standards of good legal argument change over time, how do we, standing in our own era, say that a decision from an era long ago was wrong, other than to express our own dislike of its premises and its reasoning given the controversies, commitments, and felt needs of our own day? Moreover, if constitutional historicism is sound, how do we explain or justify constitutional change in our own day? If standards of legal plausibility and correctness are conditioned by a legal culture that, in turn, is embedded in a larger historical culture, what justifies a break with existing standards, the acceptance of arguments previously thought "off-the-wall?" If the answer is that constitutional cultures change over time, how exactly does this change occur? And how can we point to changes in culture as *justifications* rather than merely explanations for changes in legal norms? To what extent does a historicist approach actually disable us from making normative claims about our own legal culture?

The various parts of this essay respond to these questions through a series of different lenses. Part I considers why *Lochner*'s canonical status has changed. Part II asks how contemporary attitudes about *Lochner* are connected to (or driven by) contemporary theories of legitimate constitutional change. Part III explores the connections between contemporary attitudes about *Lochner* and constitutional ethos – the stories we tell each other about who we are, where we have come from, and what we stand for. Part IV turns the techniques of constitutional historicism on itself and asks whether constitutional historicism can have useful normative traction for constitutional theory. If one accepts constitutional historicism, how can one say that any case, whether *Lochner*, or *Plessy*, or *Dred Scott*, "was wrong the day it was decided?" Indeed, how can one make this claim about decisions in our own day?

#### I. *LOCHNER* IN THE CONSTITUTIONAL CANON

Sanford Levinson and I have argued that law, and particularly constitutional law, has a canon of key cases and materials.<sup>13</sup> Roughly speaking, there are three types of constitutional canons. The pedagogical canon includes those key cases and materials that should be taught in constitutional law courses and reprinted in constitutional law casebooks. The cultural literacy canon is concerned with what well-educated persons should know as citizens. The academic theory canon includes those key cases and materials that any serious

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<sup>13</sup> J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998) [hereinafter Balkin & Levinson, *The Canons of Constitutional Law*].

legal academic should know and any serious theory of constitutional law must take into account.<sup>14</sup> The three canons overlap, but here I shall be primarily concerned with the third – the academic theory canon.

Cases and materials become part of the constitutional canon because they form reference points for key debates about constitutional theory at a particular point in time. As history progresses, and the focus of the legal academy shifts, different things enter and leave the canon; things that previously received significant attention from scholars recede into the background and vice versa.<sup>15</sup>

Canonical cases and materials are a terrain on which people fight battles about constitutional theory. Theorists who wish to be taken seriously in the relevant interpretive community feel that they must explain or incorporate these canonical cases or materials into their work if their theories are to be accepted; conversely, scholars find competing theories wanting to the extent that they do not offer satisfactory accounts of these canonical materials.<sup>16</sup> Canonical cases are protean – they can stand for (or be made to stand for) many different things to different theorists, and that is what makes them so useful for the work of theory. Thus, a case like *Marbury v. Madison*<sup>17</sup> can symbolize the principle of judicial supremacy, judicial review or departmentalism but not judicial supremacy, the separation of law from politics, or the necessary dependence of law on politics, depending on the theorist (and theory) in question.<sup>18</sup>

Law is distinct from other subjects with a canon, like literature, because it also has an anti-canon – a set of cases and materials that must be wrong.<sup>19</sup> Anti-canonical cases serve as examples of how the Constitution should not be interpreted and how judges should not behave. In fact, there are, roughly speaking, three different kinds of materials in the constitutional canon. Some canonical cases, like *Brown v. Board of Education*, are uniformly understood as data points that any serious theory of constitutional law must justify and

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<sup>14</sup> *Id.* at 970-71, 975-76.

<sup>15</sup> *See id.* at 1018-21.

<sup>16</sup> *See id.* (offering *Brown v. Board of Education* as the classic example of a “must explain” case).

<sup>17</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>18</sup> *See* Sanford Levinson, *Why I Don’t Teach Marbury (Except to Eastern Europeans) and Why You Shouldn’t Either*, 38 WAKE FOREST L. REV. 553, 575-76 (2003) [hereinafter Levinson, *Why I Don’t Teach Marbury*] (“concurring and dissenting opinion” of Jack M. Balkin) (arguing that the meaning and uses of *Marbury v. Madison* continually change because the case is a “classic”); *see also* Davison M. Douglas, *The Rhetorical Uses of Marbury v. Madison: The Emergence of a “Great Case”* 38 WAKE FOREST L. REV. 375, 377-78 (2003) (demonstrating how both nineteenth century conservatives and twentieth century liberals used *Marbury* to defend their legal and political agendas).

<sup>19</sup> Balkin & Levinson, *The Canons of Constitutional Law*, *supra* note 13, at 1018-19; *see also* Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 243-45 (1998) (explaining that the “anti-canon” is “the set of texts that are important but normatively disapproved”).

explain. Other canonical cases, like *Roe v. Wade*,<sup>20</sup> are canonical not because people generally agree that they are correctly decided, but because they are controversial. They are engines of contention that define an era of constitutional thinking. The decision in *Roe* may be right or wrong, but the point is that one must pay attention to it, and take a stand one way or another. *Roe* is canonical for the current generation because constitutional scholars feel that they must have something to say about it. Finally, most people agree that anti-canonical cases like *Dred Scott* were wrongly decided, and it is imperative for ambitious constitutional scholars to show, in ever more original ways, why this is so.

Literature does not have an anti-canon of this sort. One may criticize Shakespeare in any number of ways, but one does so precisely because he is widely regarded as a paragon. One does not include in the literary canon works that are generally thought to be particularly badly written as object lessons in how not to write a play or a poem.<sup>21</sup> Law, by contrast, has an anti-canon because law – and hence legal theory – is perpetually in quest of authority. Both the canon and the anti-canon provide legal authority, albeit in different ways. Legal theories gain authority by explaining why good cases are good and bad cases are bad. One gains authority by wrapping one's self in the mantle of *Brown* and by repeatedly casting out the demon of *Dred Scott*.<sup>22</sup> Conversely, one delegitimizes the claims of others by showing their inability to do the same.

Of course, law professors are not only in quest of authority. They also seek to make a name for themselves by developing interesting theories that respond to the felt necessities of their own time. One frequent consequence of an interesting theory is that it alters some, but not all of our existing understandings about the constitutional canon. Quite apart from the work of legal scholars, new cases are decided all the time and new events continually roil American (and world) history. These new decisions and new events place older cases in new perspective. They change our attitudes both about the meaning of older decisions and their canonical status. Over time, the dialectic of new theories interacting with new cases and new events reshapes the constitutional canon and our attitudes about particular decisions from the past.

For many years, *Lochner v. New York* was an established element of the anti-canon, holding a position of infamy rivaled only by *Plessy v. Ferguson* and *Dred Scott v. Sandford*. A surefire way to attack someone's views about constitutional theory was to argue that they led to *Lochner*. When John Hart

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<sup>20</sup> 410 U.S. 113 (1973).

<sup>21</sup> See Balkin & Levinson, *The Canons of Constitutional Law*, *supra* note 13, at 982-83 ("English professors, unlike law professors, do not usually offer badly written or badly reasoned literature in their courses to provoke discussion.").

<sup>22</sup> See *id.* at 1018-21.; see also Graber, *Desperately Ducking Slavery*, *supra* note 9, at 271-72 (citing the history of condemnations of *Dred Scott*).

Ely sought to denounce *Roe v. Wade* in 1973,<sup>23</sup> he coined a term – “*Lochnering*” – to display his disagreement.<sup>24</sup> *Roe* was *Lochner*, Ely proclaimed, and that was as damning an indictment as one could imagine.<sup>25</sup> Ely threw down the gauntlet before an entire generation of legal scholars. They took up the challenge, attempting to show why Ely was wrong, and why you could love *Roe* and still hate *Lochner*. An enormous amount of imaginative work in the decades that followed *Roe* was premised on this controversy. It was, we might say, the canonical task of the constitutional scholar either to square this particular circle or to show why it could not be squared. Until recently, few thought to deny the premise and argue that *Lochner* was perhaps not so wrong and that therefore it was not so urgent to distinguish it.

But times change, and so does the content of the legal canon. And because the legal canon is structured in terms of a canon of the correct, an anti-canon of the incorrect, and engines of controversy like *Roe v. Wade*, the canonical status of legal cases and materials can change in two different ways. First, like canonical works of literature, a legal case or a legal opinion – for example the *Insular Cases*<sup>26</sup> or the *Legal Tender Cases*<sup>27</sup> – can fall out of the canon, becoming neglected or forgotten until someone tries to revive interest in it once more. Second, and perhaps more interestingly for our purposes, cases or materials can shift their status from canonical works that must be correct (like *Brown v. Board of Education*) to canonical materials that are undoubtedly important but controversial (like *Roe v. Wade* in our current era) to anti-canonical cases like *Dred Scott*. *Brown v. Board of Education* was once like *Roe v. Wade* – a decision of unquestionable importance to any constitutional theorist, but one whose correctness was hotly contested. That, of course, is what gave rise to one of the most famous law review articles of all time, in which Herbert Wechsler complained that *Brown* could not be justified according to any “neutral principle” of constitutional law.<sup>28</sup> Wechsler’s

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<sup>23</sup> John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) [hereinafter Ely, *The Wages of Crying Wolf*].

<sup>24</sup> *Id.* at 944. Ely argued that “[w]hat is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers’ thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation’s governmental structure.” *Id.* at 935-36.

<sup>25</sup> *Id.* at 939-40 (asserting that *Roe* is a philosophical “twin” of *Lochner*). In fact, Ely argued that in some ways, *Roe*’s reasoning made it “the more dangerous precedent.” *Id.* at 940-43.

<sup>26</sup> *Dooly v. United States*, 183 U.S. 151 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *DeLima v. Bidwell*, 182 U.S. 1 (1901).

<sup>27</sup> *Julliard v. Greenman*, 110 U.S. 421 (1884); *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1870); *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1869). The term “*Legal Tender Cases*” sometimes refers to the trio, and sometimes merely to *Knox*, which overruled *Hepburn*.

<sup>28</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32-35 (1959).

criticism of *Brown* spawned an important scholarly debate, in which many important constitutional scholars defended *Brown* or tried to justify its result on other grounds.<sup>29</sup>

*Lochner v. New York* has not lost its canonical status in the past century. It still serves as a key point of reference and discussion, and it is still taught in introductory courses on constitutional law. But it has slowly lost its anti-canonical status for a significant number of legal scholars, although by no means all. To some legal scholars, it is no longer clear that *Lochner* was “wrong the day it was decided,” although they believe that it is wrong today.<sup>30</sup> To others, the case was quite sensible given the intellectual assumptions of its time, and its commitment to individual liberty and limited government has lessons for us today, even if it is not (and should not be) the law.<sup>31</sup> And to still others, the case was rightly decided in 1905 and perhaps is rightly decided today.

What explains the shift? *Lochner* became part of the anti-canon because it was a convenient symbol of the constitutional struggles over the New Deal in the 1930’s. Although *Lochner* has come to symbolize the jurisprudence of the entire period between 1897 and 1937, it was actually eclipsed for about a decade during the Progressive period.<sup>32</sup> In fact, by 1917, it seemed that the Court had overruled *Lochner sub silentio* in *Bunting v. Oregon*,<sup>33</sup> which upheld a maximum hour law for factory workers over the dissents of Chief Justice White, Justice Van Devanter, and Justice McReynolds.<sup>34</sup> However, following Harding’s election in 1920 and four new appointments to the Supreme Court,<sup>35</sup>

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<sup>29</sup> For a history of the period, see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1486, 1497-1500 (2004).

<sup>30</sup> See *infra* notes 62-85 and accompanying text.

<sup>31</sup> See *infra* notes 86-92 and accompanying text.

<sup>32</sup> As David Bernstein explains,

[I]n practice there was not one *Lochner* era, but three. The first period began in approximately 1897 and ended in about 1911, with moderate *Lochnerians* dominating the Court. The second era lasted from approximately 1911 to 1923, with the Court, while not explicitly repudiating *Lochner*, generally refusing to expand the liberty of contract doctrine to new scenarios, and at times seeming to drastically limit the doctrine. From 1923 to the mid-1930s, the Court was dominated by Justices who expanded *Lochner* by voting to limit the power of government in both economic and noneconomic contexts.

David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 10-11 (2003) (internal citations omitted) [hereinafter Bernstein, *Lochner Era Revisionism, Revised*].

<sup>33</sup> 243 U.S. 426 (1917).

<sup>34</sup> *Id.* at 437-39.

<sup>35</sup> President Harding appointed Chief Justice William Howard Taft and Associate Justices George Sutherland, Pierce Butler, and Edward Terry Sanford. THE SUPREME COURT OF THE U.S., MEMBERS OF THE SUPREME COURT OF THE U.S., at <http://www.supremecourtus.gov/about/members.pdf>. (last visited March 18, 2005).



the Court revived the principles of *Lochner* in 1923 in *Adkins v. Children's Hospital of the District of Columbia*.<sup>36</sup> In *Adkins* the Supreme Court held that a minimum wage law for women violated the liberty of contract.<sup>37</sup> Two of Harding's appointments, George Sutherland and Pierce Butler, joined Justices Willis Van Devanter and James Clark McReynolds to form a four person conservative bloc that would vote to strike down a number of Progressive Era (and later New Deal) laws.<sup>38</sup>

Following the struggle over the New Deal and the ascendancy of the Roosevelt Court, *Lochner* symbolized the constitutional regime that had just been overthrown.<sup>39</sup> That revolution, however, occurred through changes in judicial doctrine rather than through an Article V amendment. Hence, it was important for defenders of the New Deal to establish that prior cases had been misuses of judicial authority and wrongly decided. This meant that *Lochner*, or more correctly, what *Lochner* symbolized, had to be understood as deviant. A new generation of legal scholars was trained in the assumptions that the New Deal settlement was authoritative and that the work of the Roosevelt Court constituted the normal practice of judicial review. This helped cement the reputation of *Lochner* as an anti-canonical case in the scholarly imagination.

*Lochner's* place in the anti-canon was explained and justified through a widely accepted narrative about the prior regime, which was periodized as running roughly from *Allgeyer v. Louisiana*<sup>40</sup> in 1897 to *West Coast Hotel v. Parrish*<sup>41</sup> in 1937. The work of this prior regime was not understood in its own terms, but rather in terms of what was thought objectionable about it in the eyes of the New Deal settlement.

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<sup>36</sup> 261 U.S. 525 (1923).

<sup>37</sup> *Id.* at 553-62.

<sup>38</sup> Barry Cushman has argued that the voting patterns (and the motivations) of the famous "Four Horsemen" were actually far more complicated than the standard story suggests. Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 560-61 (1997) (arguing that Justices Van Devanter, McReynolds, Sutherland, and Butler "struck a reactionary pose in celebrated cases in order to retain the good graces of the conservative sponsors to whom they owed their positions and whose social amenities they continued to enjoy, while in legions of low-profile cases they quietly struck blows for their own left-liberal agendas").

<sup>39</sup> See, e.g., ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 131 (1987) (*Lochner* symbolizes "an era of conservative judicial intervention"); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1385 & n.5 (2001) [hereinafter Friedman, *Countermajoritarian Difficulty*] ("Until recently, scholars painted *Lochner* as the primary example of judicial activism, symbolic of an era during which courts inappropriately substituted their views as to proper social policy for those of representative assemblies.").

<sup>40</sup> 165 U.S. 578 (1897) (striking down a prohibition on contracts with out of state marine insurance companies).

<sup>41</sup> 300 U.S. 379 (1937) (upholding a state minimum wage law for women, and overruling *Adkins*).

The *Lochner* narrative that we have inherited from the New Deal projects on to the Supreme Court between 1897 to 1937 a series of undesirable traits – the very opposite of those characteristics that supporters of the New Deal settlement wanted to believe about themselves. The Old Court’s vices were the virtues of the New Deal settlement inverted. Thus, during the “*Lochner* Era” courts employed a rigid formalism that neglected social realities, while the New Deal engaged in a vigorous pragmatism that was keenly attuned to social and economic change. The *Lochner* Era Court imposed laissez-faire conservative values through its interpretations of national power and the Due Process Clause, while the New Deal brought flexible and pragmatic notions of national power that were necessary to protect the public interest. Finally, the Justices during the *Lochner* Era repeatedly overstepped their appropriate roles as judges by reading their own political values into the Constitution and second guessing the work of democratically elected legislatures and democratically accountable executive officials, while the New Deal revolution produced a new breed of Justices who believed in judicial restraint and appropriate respect for democratic processes in ordinary social and economic regulation. Justice Black’s opinion in *Ferguson v. Skrupa*<sup>42</sup> summed up the standard story well:

The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases – that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely – has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, “We are not concerned . . . with the wisdom, need, or appropriateness of the legislation.” Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to “subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.” It is now settled that States “have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.”

[We have] abandon[ed] . . . the use of the “vague contours” of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise . . . . We refuse to sit as a “superlegislature to weigh the wisdom of legislation,” and we emphatically refuse to go back to the time when courts used the Due Process Clause “to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of

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<sup>42</sup> 372 U.S. 726 (1963).

harmony with a particular school of thought.”<sup>43</sup>

This picture of the Supreme Court’s work in the late nineteenth and early twentieth centuries has been repeatedly challenged in recent years.<sup>44</sup> Scholars have pointed out that the Supreme Court did not strike down much or even most of the challenged laws brought before it,<sup>45</sup> and that the Court’s approach was not monolithic, but instead reflected shifting alliances of different personnel over a forty year span.<sup>46</sup> Others have pointed out that rather than reflecting a rigid ideology of laissez-faire, the Court’s jurisprudence represented a fairly sophisticated police power theory of limited government.<sup>47</sup> Finally, rather than straying from the original understanding of the judicial role – one to which, as Justice Black explained, the post-New Deal Court had soberly returned – the jurisprudence of the late nineteenth and early twentieth centuries reflected ideas quite familiar to the framers of the Fourteenth Amendment; namely, that the Amendment was designed to prevent so-called

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<sup>43</sup> *Id.* at 730-32 (internal citations omitted).

<sup>44</sup> For summaries of the literature of *Lochner* era revisionism, see Friedman, *supra* note 39, at 1390-1402; Stephen A. Siegel, *The Revision Thickens*, 20 LAW & HIST. REV. 631 (2002); James A. Thomson, *Swimming in the Air: Melville W. Fuller and the Supreme Court 1888-1910*, 27 CUMB. L. REV. 139, 140-41 & n.6 (1996-1997).

<sup>45</sup> See Bernstein, *Lochner Era Revisionism, Revised*, *supra* note 32, at 9 & n.24 (noting cases in which the *Lochner* Era Court upheld Progressive Era legislation); see also HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 4-5, 208-10 n.10 (1993) [hereinafter GILLMAN, *THE CONSTITUTION BESIEGED*] (noting that “557 of 560 state laws challenged under the due process or equal protection clauses . . . were upheld by the justices” in the years leading up to and following *Lochner*) (citing Charles Warren, *A Bulwark to the State Police Power – The United States Supreme Court*, 13 COLUM. L. REV. 667, 668-69 (1913); Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 295 (1913)).

<sup>46</sup> See Bernstein, *Lochner Era Revisionism, Revised*, *supra* note 32, at 10-11; Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 6-23 (1991).

<sup>47</sup> Scholars have offered different theories as to the source and purpose of this jurisprudence. See, e.g., OWEN M. FISS, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910*, at 158-65 (1993) (arguing that the goal of *Lochner* Era police power jurisprudence was to define inherent limits of government which followed from the nature of the social contract); GILLMAN, *THE CONSTITUTION BESIEGED*, *supra* note 45, at 10, 46, 60-61, & 127 (arguing that the goal of police powers jurisprudence was to minimize factional conflict by prohibiting “class legislation” that benefited specific groups or redistributed income from one group to another); Bernstein, *Lochner Era Revisionism, Revised*, *supra* note 32, at 12, 21-38, 49-52 (criticizing Gillman and arguing that the goal of police powers jurisprudence was to promote individual liberty and recognize natural rights); Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489, 1533, 1539-40 (1998) (arguing that the Court’s substantive due process jurisprudence attempted to safeguard aspects of culture and tradition necessary to define personal identity from state managerial control and legislative objectification).

“class legislation” that favored one group over another, an idea which developed out of Jacksonian and free labor ideology.<sup>48</sup>

Two points are worth emphasizing here. First, membership in the canon (or anti-canon) usually comes complete with a governing narrative about the nation’s history or (usually) its eventual progress.<sup>49</sup> Thus, the canon of cases and materials is also a canon of stock stories, myths, and narratives.<sup>50</sup> “*Lochner*” is not just the decision in *Lochner v. New York*, but an accompanying story about the place of that decision in the history of the Constitution, the Court, and the country. Like a cereal box with a free toy inside, every canonical case comes with a story of its own.

Second, because cases come with narratives, the construction of the canon and the inclusion of a certain case or event do important political and ideological work. Constructing the canon with its accompanying narratives helps legitimate a certain view of the Constitution, the Court, and the country.<sup>51</sup> In this case, *Lochner*’s anti-canonical status helped legitimate the New Deal settlement, supported progressive and democratic ideals, and reinforced a stock story of America’s gradual emergence from the anarchy of unrestrained capitalism into a wise and beneficent regulatory and welfare state.

Time does not stand still however, and as the years passed, the struggles over the New Deal receded in memory or became less urgent. New constitutional controversies arose, and with them came new Supreme Court decisions. We no longer live in the immediate wake of the struggles over the New Deal, as did the legal scholars of the 1940’s, 1950’s, and 1960’s. Rather, the New Deal has receded to the background, giving way to later, more urgent struggles. This new set of struggles concerned the legitimacy of the Second Reconstruction and the Rights Revolution symbolized by *Brown v. Board of Education* and the work of the Warren and early Burger courts. As previously noted, *Brown*, once a controversial decision, has become a foundational element of the present constitutional canon, while *Roe v. Wade* has become the central and fraught symbol of the Supreme Court’s legitimacy and authority to interpret the Constitution.

For the first several decades following the New Deal settlement, the anti-canonical status of *Lochner* helped affirm the correctness of the New Deal revolution and its consistency with the American constitutional tradition.

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<sup>48</sup> GILLMAN, THE CONSTITUTION BESIEGED, *supra* note 45, at 7, 10-13, 21, 33-60; Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW. & HIST. REV. 293, 318 (1985). *But see* Bernstein, *Lochner Era Revisionism, Revised*, *supra* note 32, at 12-13, 58-60 (arguing that the revisionist view is inadequate to explain fundamental rights jurisprudence in the *Lochner* period).

<sup>49</sup> See Balkin & Levinson, *The Canons of Constitutional Law*, *supra* note 13, at 987-92 (discussing constitutional narratives that accompany canonical cases).

<sup>50</sup> *Id.*

<sup>51</sup> *See id.*

However, that fight was eclipsed by later struggles over the Second Reconstruction and the Rights Revolution. By the 1970's and 1980's conservatives opposed to what they saw as liberal judicial activism used *Lochner's* anti-canonical status to attack what they regarded as judicial overreaching by the Warren and early Burger Courts.<sup>52</sup> This criticism was telling precisely because liberal legal scholars, like their more conservative colleagues, had been raised to believe in the essential correctness of the New Deal settlement. Hence, John Hart Ely, a liberal, showed his bona fides by attacking *Roe* as “Lochnering,”<sup>53</sup> and Robert Bork, a conservative, attacked defenders of *Roe* and other liberal decisions by comparing them to the dreaded substantive due process of *Lochner v. New York*.<sup>54</sup>

The assumption that *Lochner* was wrong was shared by both sides fighting over the legitimacy of the Second Reconstruction and the Rights Revolution. Liberal constitutional scholars attempted, in increasingly ingenious ways, to demonstrate that *Lochner* was wrong but that the work of liberal judges in the 1950's, 1960's, and 1970's had been right.<sup>55</sup> The resulting intellectual tension – premised on *Lochner's* anti-canonical status – produced some of the most interesting scholarship in the twentieth century.

By the middle of the 1980's, however, the New Deal Revolution was nearing fifty years old. The Second Reconstruction and the Rights Revolution had been absorbed and normalized in some respects, and beaten back in others. *Roe v. Wade* and affirmative action formed the new battleground. Conservative social movements dominated American politics, conservatives were in the ascendance in both the White House and the federal judiciary, and liberals, rather than aggressively pushing a progressive agenda as they had in years past, found themselves increasingly in a rearguard action trying to protect and conserve the gains of the previous three decades.

The fight between liberals and conservatives was changing, and they were joined by a new subset of conservatives; libertarians, the intellectual children of Goldwater's 1964 presidential campaign and the Reagan revolution. Just as social movement activism had spurred judicial innovation on the left during the Second Reconstruction and the Rights Revolution, new conservative social movements would eventually help spur judicial innovation by conservatives.

Once in power in the federal judiciary, conservative jurists found judicial

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<sup>52</sup> See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 44 (1990) (arguing that *Lochner* is “the symbol, indeed the quintessence, of judicial usurpation of power”); WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 205 (1987) (arguing that *Lochner* is “one of the most ill-starred decisions that [the Court] ever rendered”).

<sup>53</sup> See Ely, *The Wages of Crying Wolf*, *supra* note 23, at 943-44; see also *id.* at 940 (arguing that *Lochner* and *Roe* are twin cases).

<sup>54</sup> See BORK, *supra* note 52, at 225 (arguing that those who support *Roe v. Wade* and *Griswold v. Connecticut*, 381 U.S. 479 (1965), must also defend *Lochner* and *Adkins*).

<sup>55</sup> The most famous example, of course, is JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

restraint a less palatable philosophy than they had imagined. They too discovered the joys of reshaping constitutional doctrine in response to social movement energy, and they too discovered that they could turn the liberal rhetoric of the Civil Rights Movement and the Rights Revolution to new purposes. Conservative litigators argued that courts should give expanded protection to the rights of white males, religious conservatives, advertisers, cigarette companies, persons accused of sexual harassment, property owners, groups opposed to homosexuality, and conservative students and faculty in colleges and universities. In this endeavor they made full use of many of the same provisions that liberals had – including the First, Fifth, and Fourteenth Amendments. Conservatives also argued for restrictions on federal civil rights and the commerce power under the Tenth and Eleventh Amendments. Pushing for a right wing version of the Rights Revolution meant that conservative courts need not be restrained. Indeed, to vindicate rights that conservatives were fighting for judges would have to strike down statutes and administrative regulations quite frequently.

Keith Whittington has pointed out that although conservative constitutionalism is often associated with a philosophy of original understanding or original intention, there is a distinctive shift between what he calls the old originalism of figures like Robert Bork and the new originalism that characterized the Rehnquist Court and its defenders.<sup>56</sup> The old originalism was designed to promote judicial restraint and criticize the judicial innovations of liberal judges in the 1950's, 1960's, and 1970's. The new originalism was employed to defend the innovations of an empowered conservative judiciary.

In this new world, the anti-canonical status of *Lochner* makes considerably less sense. Although the refrain of “activist judges” was and is still a familiar complaint from conservative politicians, conservative jurists have long since made their peace with judicial review, especially where it means increased restraints on federal regulatory and civil rights power. In addition, contemporary libertarians can find much to admire in the Fuller Court's belief in limited government, both at the federal and state levels.<sup>57</sup> For example,

<sup>56</sup> Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004).

<sup>57</sup> Examples of contemporary libertarian arguments for *Lochner* or for a renewal of *Lochner*-style jurisprudence include BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 318-21 (1980); James W. Ely, Jr., *Melville W. Fuller Reconsidered*, 1 J. SUP. CT. HIST. 35, 35-36 (1998); Richard A. Epstein, *The Mistakes of 1937*, 11 GEO. MASON L. REV. 5, 6 (1988); Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 WM. & MARY L. REV. 3, 62-64 (1999); Roger Pilon, *How Constitutional Corruption Has Led to Ideological Litmus Tests for Judicial Nominees*, 7 CATO POL'Y ANALYSIS No. 446, at 7 (Aug. 6, 2002); Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 HARV. L. REV. 1363, 1363-83 (1990); see also HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS 272-76 (1994) (making natural law arguments for *Lochner*); cf. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 354-57 (2003) (defending a more general

David Bernstein, while insisting that the reputation of the Fuller and Taft Courts as thoroughly laissez-faire is undeserved, nevertheless argues that the libertarian impulses of these courts offered far greater promise for women and minorities than the statism of the New Deal that followed.<sup>58</sup> *Buchanan v. Warley* recognized the right of blacks to contract,<sup>59</sup> while *Adkins v. Children's Hospital* saw a larger meaning in the Nineteenth Amendment that gave women contractual liberties equal to those of men.<sup>60</sup> Conversely, the key symbol of the New Deal regime, *West Coast Hotel v. Parrish*, had actually upheld a

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libertarian interpretation of the Constitution).

<sup>58</sup> See, e.g., DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 5-7 (2001) [hereinafter BERNSTEIN, ONLY ONE PLACE OF REDRESS] (arguing that labor regulations harmed blacks and that *Lochner* Era jurisprudence actually helped them by holding discriminatory laws unconstitutional); David E. Bernstein, *Lochner, Parity, And The Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211, 212 (1999) (acknowledging the use of *Lochner*-style arguments to challenge discriminatory legislation directed at Asians); David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 859 (1998) [hereinafter Bernstein, *Philip Sober Controlling Philip Drunk*] (arguing that *Buchanan v. Warley*, 245 U.S. 60 (1917), limited the application of Jim Crow); David E. Bernstein, *Plessy vs. Lochner: The Berea College Case*, 25 J. SUP. CT. HIST. 93, 100-01, 108 (2000) (arguing that the restrictions on state police power characteristic of *Lochnerian* jurisprudence worked to the advantage of blacks); David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 TEX. L. REV. 781, 824-47 (1998) (arguing that *Lochner* Era jurisprudence was favorable to African-Americans); David E. Bernstein, *Two Asian Laundry Cases*, 24 J. SUP. CT. HIST. 95, 97-98 (1999) (noting use of *Lochner*-style arguments to challenge legislation directed at Asians); David E. Bernstein, *Lochner's Feminist Legacy*, 101 MICH. L. REV. 1960, 1975-78 (2003) (book review) [hereinafter Bernstein, *Lochner's Feminist Legacy*] (arguing that *Lochner* Era jurisprudence, including *Adkins v. Children's Hospital*, was in women's interests, while protective paternalistic laws for women workers were not). Bernstein is not the only scholar who has seen the connections between libertarianism and the interests of women and minorities. See, e.g., RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 98-115 (1992) (arguing that the constitutional ideas of *Lochner* would have led to the opposite result in *Plessy v. Ferguson*); Anne C. Dailey, *Lochner For Women*, 74 TEX. L. REV. 1217, 1120-21 (1996) (contrasting *Lochner* with *Muller v. Oregon*, 208 U.S. 412 (1908), which upheld a maximum hour law for women).

<sup>59</sup> 245 U.S. 60, 82 (1917) (holding that a residential segregation ordinance violated the Fourteenth Amendment's Due Process Clause because it interfered with the right to own and dispose of real property and thus was not within the state's police power).

<sup>60</sup> 261 U.S. 525, 553 (1923) (“In view of the great – not to say revolutionary – changes which have taken place since that utterance, in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment . . . we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances.”).

Washington state law that openly discriminated on the basis of sex.<sup>61</sup>

Just as some conservative and libertarian scholars could see *Lochner* as less inhospitable, some liberal scholars could find *Lochner* less threatening. With the distance of a century, there is less need to caricature the past or view it in monolithic terms. The great battles have been fought long ago. Liberal and progressive historians have become so accustomed to the correctness of the New Deal settlement that they are now able to view the Fuller Court with the distanced eye of the anthropologist. They try to understand why jurists wrote and thought as they did; they attempt to find continuity between the views of the Fuller Court and the legal understandings of previous eras. Howard Gillman's work, for example, connects the jurisprudence of *Lochner* to the Jacksonian and Reconstruction principle that there should be no "class legislation."<sup>62</sup> When one understands the legacy of Jacksonianism and Reconstruction, Gillman argues, one discovers a relatively coherent vision of police power jurisprudence in which *Lochner* fits fairly comfortably.<sup>63</sup> Indeed, once we understand the underlying assumptions of the Fuller Court, Holmes' dissent in *Lochner* is the true outlier, because it rejects the premises of police power jurisprudence and asserts an almost total power in legislatures akin to that of the British Parliament.<sup>64</sup> Because Holmes' dissent rejected the background assumptions of the late nineteenth and early twentieth centuries, it was celebrated by progressives and New Dealers.<sup>65</sup> It became the canonical rejection of the anti-canonical decision in *Lochner*. Justice Harlan's dissent,<sup>66</sup> by contrast, inhabits the same world of police power jurisprudence as Justice Peckham's majority opinion, and hence could not serve as a rallying cry for the New Deal. As a result, it received much less attention until fairly recently.

Liberal scholars like Bruce Ackerman and Owen Fiss have rejected Ely's challenge and turned the liberal jurisprudential project of the past thirty years on its head. Instead of attempting to show why the New Deal and the Rights Revolution are consistent with the incorrectness of *Lochner*, they have tried to show why they are fully consistent with *Lochner* being plausible or even

<sup>61</sup> 300 U.S. 379, 400 (1937) (upholding an act authorizing a minimum wage for women).

<sup>62</sup> GILLMAN, *THE CONSTITUTION BESIEGED*, *supra* note 45, at 49-50.

<sup>63</sup> *Id.* at 20-21.

<sup>64</sup> *Id.* at 131 (explaining that Holmes' extreme deference to majority rule "amounted to an abdication of judicial responsibility that was as unacceptable to his peers as it would be today if the same was said about the Court's approach to racial classifications"); *see also* FISS, *supra* note 47, at 179-84 (observing that while the rest of the Court labored to understand the proper scope of the police power, Holmes struck off in a new direction by gutting the means-ends analysis and embracing the "widest conception" of permissible goals for the legislature).

<sup>65</sup> Friedman, *Countermajoritarian Difficulty*, *supra* note 39, at 1403 (describing popular attacks on the conservative judiciary from 1895 to 1924).

<sup>66</sup> *See* *Lochner v. New York*, 198 U.S. 45, 65-74 (Harlan, J., dissenting) (concluding that a statute that established maximum work hours for bakers constituted a reasonable exercise of the police power).



correct in its own era. Ackerman argues that the New Deal made a decisive break authorized by the American public.<sup>67</sup> "The *Lochner* Court," Ackerman explains, "was doing what most judges do most of the time: interpreting the Constitution, as handed down to them by the Republicans of Reconstruction."<sup>68</sup> He concludes that "*Lochner* is no longer good law because the American people repudiated Republican constitutional values in the 1930's, not because the Republican Court was wildly out of line with them before the Great Depression."<sup>69</sup>

Fiss argues that the Fuller Court's attempt to rationalize the meaning of liberty and articulate the terms of the constitutional social contract naturally evolved into a new social contract during the New Deal, followed, in turn, by the Warren Court's attempt to rationalize the meaning of equality in a post-New Deal Era.<sup>70</sup> Both scholars, in their distinctive ways, argue that liberals need not fear the ghost of *Lochner* because *Lochner* was either plausible or correct in its own time and we have either broken with the past or have successfully evolved from it.

Ironically, for Ackerman the best way to defend the New Deal is to defend the correctness of *Lochner* in its own era. *Lochner*, he contends, is a characteristic example of the jurisprudence of what Ackerman calls America's "Second Republic" that emerged after the Civil War.<sup>71</sup> Just as the Supreme Court was duty bound to defend the old order until a constitutional moment changed the foundations of the American constitutional system, so too Justices today are duty bound to uphold the New Deal settlement (and the Rights Revolution, which Ackerman views as a continuation of the same) until a new constitutional moment overthrows our Third Republic and establishes a Fourth. Thus, in Ackerman's view, one may reproach the Rehnquist Court for being insufficiently conservative – for abandoning principles that were settled in the 1930's and 1940's by "We the People."<sup>72</sup>

In like fashion, the plausibility of *Lochner* holds no terrors for Fiss because *Lochner* represents an older vision of limited government designed to guarantee individual liberty. Our country has evolved from this conception to a regulatory and welfare state, in which equality is a central value.<sup>73</sup> One form of the social contract has replaced another.<sup>74</sup> We live in a constitutional age

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<sup>67</sup> 1 ACKERMAN, *supra* note 9, at 65-67, 99-103; 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 25-26, 280 (1998).

<sup>68</sup> 2 ACKERMAN, *supra* note 67, at 280.

<sup>69</sup> *Id.*

<sup>70</sup> FISS, *supra* note 47, at 19-21.

<sup>71</sup> 2 ACKERMAN, *supra* note 67, at 280.

<sup>72</sup> See 2 ACKERMAN, *supra* note 67, at 419-20 (arguing that Reagan's attempt at a constitutional moment in the 1980s had failed as of 1998 and that we "have returned to normal politics").

<sup>73</sup> See FISS, *supra* note 47, at 392-93.

<sup>74</sup> As Fiss puts it:

that recognizes that “state activism is a constitutional duty” and in which equality is a central constitutional value.<sup>75</sup> Thus, from Fiss’s perspective, one may reproach the Rehnquist Court for attempting to turn back the clock: the Court has ignored the progressive narrative of American constitutional jurisprudence and its evolution from a central concern with liberty enforced through limited government to a focus on equality enforced through positive government action.<sup>76</sup>

Instead of accepting Ely’s choice – either *Lochner* is wrong or *Roe* is right – Fiss argues that we can have the best of both worlds: we can defend the *Lochner* Court’s role in explicating and defending public values while disagreeing with the particular substantive values it protected as being characteristic of its time, but not of our own. *Lochner* offered a reasonable (if ultimately incorrect) substantive vision of liberty for its time, based on a theory of social contractarianism – a respected and widely held intellectual tradition of thought.<sup>77</sup> In Fiss’s view, *Lochner* was not a mere “exercise of class justice.”<sup>78</sup> Rather, it was a reasoned “attempt to explicate and protect the constitutional ideal of liberty.”<sup>79</sup> Sometimes the Justices may get the particulars wrong, but they should not be criticized for using reason and principle to protect important constitutional values as they understand them.<sup>80</sup> “*Lochner* may be illegitimate and an error,” Fiss explains, “but once we see clearly what it was trying to do, we may wish to criticize its substantive values and yet leave unimpeached its conception of role – which it shared in common with *Brown* [*v. Board of Education*].”<sup>81</sup> Indeed, in both *Brown* and *Lochner* the Supreme Court was engaged in a worthy endeavor – using reason to protect

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[M]uch of the history of constitutional law of the twentieth century has an evolutionary quality: *Lochner* enforced the social contract; the decisions of the 1910s and 1920s modified some of the terms of that contract; the New Deal required that the contract be breached; the settlement of 1937 held that breach to be constitutionally permissible; and *Brown* transformed that breach into a constitutional necessity and set the state free to promote equality.

*Id.* at 394.

<sup>75</sup> *Id.* at 393.

<sup>76</sup> *Id.* at 394-95. Fiss argues that:

[T]he Court’s doctrine has become increasingly individualistic. Like the Fuller Court before it, the present Court has posited the priority of liberty over equality, treated liberty as little more than a promise of limited government, and . . . has separated state and society into two spheres and treated the social sphere, largely defined by market exchange, as natural and just. . . . The present Court, cut from the same mold as the one that gave us *Lochner*, now is haunted by the challenge *Brown* poses to the substance of this Court’s doctrine: contractarianism redux.

*Id.*

<sup>77</sup> *Id.* at 158-59.

<sup>78</sup> *Id.* at 19.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

central constitutional values. “The Court owed its primary duty to a set of values it saw enshrined in the Constitution and gave itself the task of protecting those values from encroachment by the political branches.”<sup>82</sup> The Justices of the Fuller Court “believed that the Constitution embodies a set of values that exists apart from, and above, ordinary politics and that their duty was to give, through exercise of reason, concrete meaning and expression to these values.”<sup>83</sup>

Ackerman, Fiss, and Gillman all offer different versions of constitutional historicism. They are willing to accept that the correctness of legal reasoning can and does change with changing times. But in each case the historicism is different. Gillman is somewhat less interested in legitimating the present or criticizing the current Supreme Court than with critiquing the attitudinal model in political science and justifying a New Institutionalism that urges political scientists to take the professional constraints of law seriously.<sup>84</sup> Ackerman and Fiss are engaged in defensive projects. They are attempting to shore up and legitimate a constitutional jurisprudence that has been repeatedly attacked from the right since the 1950’s; they are defending against a conservative entrenchment in the judiciary that would like to engage in its own creative transformation of the social contract.<sup>85</sup>

David Bernstein’s reinterpretation of *Lochner* from the libertarian right is equally interesting. Bernstein offers two major claims in his attempted rehabilitation of *Lochner*. First, Bernstein sees *Lochner* as a reasonable decision that should be understood on its own terms rather than as a shibboleth.<sup>86</sup> Bernstein, like Gillman, argues that the notion of a single, monolithic “*Lochner* Era” is exaggerated and caricatures history, and that the period between 1897 and 1937 was not an era of unmitigated laissez-faire conservatism.<sup>87</sup> Hence the familiar history invoked by progressive critics of *Lochner* is wrong.<sup>88</sup> Moreover, Bernstein argues, *Lochner* was not an example

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<sup>82</sup> *Id.* at 19-20; see also *id.* at 11-18, 199-201.

<sup>83</sup> *Id.* at 20.

<sup>84</sup> See GILLMAN, *THE CONSTITUTION BESIEGED*, *supra* note 45, at 202. That is not to say that Gillman lacks any normative agenda: as he points out “[c]onservatives have used the lore of *Lochner* as a weapon in their struggle against the modern Court’s use of fundamental rights as a trump on government power. If nothing else I hope this study helps remove that weapon from their hands.” *Id.* at 205.

<sup>85</sup> See 2 ACKERMAN, *supra* note 67, at 419-20 (expressing concern about the legal direction of the Reagan Revolution); FISS, *supra* note 47, at 394-95 (“Like the Fuller Court before it, the present Court has posited the priority of liberty over equality, treated liberty as little more than a promise of limited government, and . . . has separated state and society into two spheres and treated the social sphere, largely defined by market exchange, as natural and just.”).

<sup>86</sup> Bernstein, *Lochner Era Revisionism, Revised*, *supra* note 32, at 4, 7-12.

<sup>87</sup> *Id.* at 7-10.

<sup>88</sup> *Id.* at 7-12 (“The deluge of *Lochner* revisionism has laid to rest various aspects of the conventional story, especially the idea that the origins of *Lochnerian* jurisprudence lay in

of a rigid formalism that paid no attention to the facts. It simply interpreted the facts differently.<sup>89</sup> Bernstein's second major claim is that the *Lochner* opinion reflected a valuable libertarian strain in the American constitutional tradition. In particular, this libertarianism was good for women and minorities, much better, he contends, than the New Deal paradigm of economic regulation that succeeded it.<sup>90</sup> "[T]he basic motivation for *Lochnerian* jurisprudence," Bernstein argues, "was the Justices' belief that Americans had fundamental unenumerated constitutional rights, and that the Fourteenth Amendment's Due Process Clause protected those rights."<sup>91</sup> The Justices of the Supreme Court, Bernstein contends, "had a generally historicist outlook, seeking to discover the content of fundamental rights through an understanding of which rights had created and advanced liberty among the Anglo-American people. . . . [I]n this regard *Lochner* was the progenitor of modern substantive due process cases such as *Griswold v. Connecticut*, *Roe v. Wade*, and *Lawrence v. Texas*."<sup>92</sup> Bernstein, a scholar with libertarian sympathies, is reinterpreting *Lochner* for a new generation of conservatives who have assimilated the lessons of *Brown v. Board of Education* and the Civil Rights Movement. Bernstein is offering a libertarian defense of *Lochner* after the Civil Rights Revolution.

## II. *LOCHNER* AND CONSTITUTIONAL CHANGE

The question whether *Lochner* was wrong the day it was decided is deeply connected to the debate over theories of legitimate constitutional change. Without an explanation of legitimate constitutional change, it is hard to explain why *Lochner* is not good law today if it was correctly decided in 1905. Conversely, if *Lochner* was wrong the day it was decided, one merely has to

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'laissez-faire Social Darwinism.'"). Bernstein also criticizes Cass Sunstein's argument that *Lochner* Era jurisprudence assumed that the common law provided a baseline of redistributive neutrality. Compare David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1, 16 (2003) (arguing that Sunstein overstates the historical record) with Cass Sunstein, *Reply – Lochnering*, 82 TEX. L. REV. 65, 69 (2003) (arguing that "[i]nsofar as the *Lochner* Court invalidated legislation under the Due Process Clause, it usually did so because it saw the Constitution as forbidding departures from the common law unless those departures could be justified as falling under certain specific 'heads' of the police power").

<sup>89</sup> Bernstein, *Lochner Era Revisionism, Revised*, *supra* note 32, at 7-12.; David E. Bernstein, *Lochner v. New York: Barrier to the Regulatory State*, in CONSTITUTIONAL LAW STORIES 325, 344-45 (Michael C. Dorf ed., 2004).

<sup>90</sup> BERNSTEIN, ONLY ONE PLACE OF REDRESS, *supra* note 58, at 5-7 (arguing that *Lochner* Era jurisprudence aided African-Americans more than it harmed them); Bernstein, *Lochner's Feminist Legacy*, *supra* note 58, at 1980-81, 1984 (arguing that protective labor laws for women harmed their interests); Bernstein, *Philip Sober Controlling Philip Drunk*, *supra* note 58, at 859 (arguing that the libertarian decision in *Buchanan v. Warley* limited the reach of Jim Crow).

<sup>91</sup> Bernstein, *Lochner Era Revisionism, Revised*, *supra* note 32, at 12-13.

<sup>92</sup> *Id.* at 13.

overcome the general norm that one should respect previous precedents.<sup>93</sup> The New Deal settlement then looks like a restoration of proper constitutional principles from which the *Lochner* Court had unwisely strayed. Although, as we shall see, the question is actually somewhat more complicated, maintaining that *Lochner* was wrong the day it was decided makes the legitimization of the New Deal somewhat easier than if one assumes that it was correctly decided.

*Lochner* was never officially overruled by an Article V amendment. Instead it was overruled *sub silentio* in judicial decisions. In fact, it was overruled *sub silentio* twice, first in 1917 in *Bunting v. Oregon*.<sup>94</sup> It was revived in *Adkins*,<sup>95</sup> and then was overruled a second time in a series of decisions beginning in 1934 with *Nebbia v. New York*.<sup>96</sup>

Whether *Lochner* was rightly decided matters greatly depending on one's theory of legitimate constitutional change. Most theories of precedent acknowledge that courts may overrule decisions originally decided incorrectly if there are good reasons to do so. For example, the original decision may have been undermined by later decisions, it may have proven administratively

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<sup>93</sup> See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 864 (1992) (Joint Op. of O'Connor, Kennedy, and Souter, JJ.) (“[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.”); see also *Dickerson v. United States*, 530 U.S. 428, 442-44 (2000) (“Whether or not we would agree with *Miranda*’s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.”); *United States v. IBM Corp.*, 517 U.S. 843, 856 (1996) (explaining that special justification is required to overrule precedent); *Adarand Constructors v. Peña*, 515 U.S. 200, 231 (1995) (“Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification.”) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). I use the word “norm” here instead of “rule” because it is not at all clear that the Supreme Court actually has an official rule against overruling wrong decisions. At the very least, that rule, if it exists, is honored in the breach as much as in the observance. Akhil Amar argues that before *Casey*, there was no clear general practice of upholding incorrect precedents and that there were “quite a few prominent overrulings based simply on the belief that the prior case was wrongly decided.” Akhil Reed Amar, *Forward: The Document and The Doctrine, The Supreme Court 1999 Term*, 114 HARV. L. REV. 26, 82 (2000) [hereinafter Amar, *Forward*]; see also *id.* at 33 n.28 (listing examples). Furthermore, several Supreme Court cases suggest that wrongly decided precedents should enjoy comparatively little *stare decisis* protection. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“*Stare decisis* is not an inexorable command . . . particularly . . . in constitutional cases, because in such cases ‘correction through legislative action is practically impossible.’”) (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)).

<sup>94</sup> 243 U.S. 426, 439 (1917) (upholding state maximum hour and overtime provisions).

<sup>95</sup> *Adkins v. Children’s Hosp.*, 261 U.S. 525, 545, 562 (1923) (striking down a minimum wage law for women).

<sup>96</sup> 291 U.S. 502, 539 (1934) (upholding state-mandated price supports for milk); see also *West Coast Hotel v. Parrish*, 300 U.S. 379, 393-94, 400 (1937) (overruling *Adkins* explicitly).

unworkable, and reversing it may do little harm to settled interests.<sup>97</sup> But these standard arguments for limiting *stare decisis* apply most clearly to cases that were initially wrongly decided. If one concedes that the original decision was correctly resolved, the burden is not simply to show why the usual norm of *stare decisis* does not apply. Rather, the burden is to show how the meaning of the Constitution itself has changed in the interim. If the old decision was correctly decided, then, presumably, that decision was consistent with the best interpretation of the Constitution. In order to justify overruling a decision correctly decided at a previous time, one must do more than justify overturning settled precedent; one must also have compelling reasons why the meaning of the Constitution itself has changed in the interim. One cannot simply claim that intervening decisions have undermined the older decision. For if the older decision was correct when it was decided, then perhaps it is the later, inconsistent decisions, that should be reexamined.

Thus, if *Lochner* was not wrong the day it was decided, one needs a theory of the judicial role that allows judges to overrule decisions that were *correct* in their own time, but have proven outmoded at a later date. In short, one needs a persuasive theory of Living Constitutionalism, by which I mean a theory that argues that the best interpretation of the Constitution's meaning changes in accordance with changing circumstances and events, and that it is the duty of all actors, including judges, to change their interpretations of the Constitution to reflect these changing circumstances.<sup>98</sup> Indeed, living constitutionalism arose as a constitutional theory during the Progressive Era and the New Deal precisely to explain why the courts could overturn settled precedents and understandings about limited federal power.<sup>99</sup> Earlier decisions were not

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<sup>97</sup> See, e.g., *United States v. Gaudin*, 515 U.S. 506, 520-22 (1995) (asserting that *stare decisis* may yield where a prior decision's "underpinnings [have been] eroded, by subsequent decisions of this Court"); *Casey*, 505 U.S. at 854-57 (explaining when the Supreme Court is entitled to overrule its previous decisions); *Payne*, 501 U.S. at 827-28 ("[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944))); *Alabama v. Smith*, 490 U.S. 794, 803 (1989) (explaining that a "later development of . . . constitutional law" is a basis for overruling a decision). For discussions of when the Supreme Court should respect and when it should overrule its previous (wrongly decided) precedents, see Amar, *Forward*, *supra* note 93, at 82-89; Jerold H. Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 219-29, 242-70 (describing the general "techniques of overruling" employed by the Supreme Court).

<sup>98</sup> See, e.g., Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191, 192-94 (1997) (contrasting originalism with modern conception of living constitutionalism.).

<sup>99</sup> See *id.* at 192-96 (arguing that judges and scholars turned to the idea of a living constitution "designed to adapt to changing environments and social purposes" as a means to construct a new America "without formally amending their eighteenth-century Constitution").

necessarily wrong at the time they were decided, but they had become wrong in light of changing social facts.<sup>100</sup> Not surprisingly, living constitutionalism is a controversial theory, which, since the New Deal, has proved much more acceptable to liberals than to conservatives.

Given a legitimate change in constitutional meaning, however, there is nothing problematic about the fact that *Lochner* moves from being correctly decided in 1905 to being “off-the-wall” from the standpoint of the post-New Deal Constitutional regime. *Lochner*’s correctness in 1905 is only problematic if one believes that there had been no fundamental and legitimate change in constitutional principles between 1905 and 1937, because, for example, there had been no intervening Article V amendment. Hence, one way to avoid the problem is to argue that a constitutional amendment did overrule *Lochner*, although the Court did not realize it at the time. This is Akhil Amar’s solution. He argues that *Lochner* was effectively overruled by the Sixteenth Amendment, which allowed the redistribution of wealth through the federal income tax and thus signaled that redistribution of income was now a constitutionally permissible purpose for legislation.<sup>101</sup> If one does not accept Amar’s textual solution, it is hard to find another relevant amendment ratified between 1905 and 1937. Thus, one must conclude that an Article V amendment was unnecessary to alter basic constitutional principles during the New Deal and one must provide an alternative theory of legitimate constitutional change.

Bruce Ackerman’s theory of constitutional change argues that *Lochner* and *Hammer v. Dagenhart*<sup>102</sup> were effectively overruled by a constitutional moment around 1937, which ushered in our Third Republic.<sup>103</sup> Once one

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<sup>100</sup> See *id.* at 192-93.

<sup>101</sup> Akhil Reed Amar, *The Constitutional Virtues and Vices of the New Deal*, 22 HARV. J.L. & PUB. POL’Y 219, 221-22 (1998) (asserting that *Lochner* “is not a plausible reading . . . after the Sixteenth Amendment, . . . which is not just about an income tax, but . . . a redistributive income tax”); cf. Amar, *Foreword*, *supra* note 93, at 72 (“[H]owever plausible a general constitutional objection to redistribution might have been in 1905, it became wholly implausible as a matter of constitutional structure after the People enacted the Sixteenth Amendment in clear anticipation of a permissively progressive income tax aimed at reducing economic inequality.”); see also Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising The Slaughter-house Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 92 (1996) (“One assumption behind *Lochner* Era jurisprudence was that government redistribution of wealth was a constitutionally impermissible objective. Whatever merits this idea may have had have been undermined by the Sixteenth Amendment, giving Congress a broad power to levy a progressive income tax.”).

<sup>102</sup> 247 U.S. 251, 277 (1918) (striking down a federal law prohibiting shipment in interstate commerce of goods made using child labor).

<sup>103</sup> 1 ACKERMAN, *supra* note 9, at 65-67, 99-103 (arguing that the American people repudiated the laissez-faire principles of *Lochner* and ushered in a new regime of the activist state).

accepts Ackerman's system, the correctness of *Lochner* in 1905 does not pose a significant problem. To the contrary, as we have seen, Ackerman uses the correctness of *Lochner* as evidence of the soundness of his theory. Each successive regime features a distinctive combination and synthesis of principles.<sup>104</sup> Cases correctly decided in one regime will prove inappropriate to another to the extent that they conflict with the basic understandings of a later era.<sup>105</sup> Thus, Ackerman suggests that *Lochner* was fully consistent with the jurisprudential assumptions underlying the Constitution following Reconstruction – what he calls our Second Republic – although it is not consistent with the constitutional principles of the Post-New Deal Third Republic.<sup>106</sup>

Conceding *Lochner*'s correctness in 1905 also helps Ackerman make his case that the Revolution of 1937 was not a restoration to an earlier correct form of constitutional reasoning, but instead was part of a decisive break with the past.<sup>107</sup> The American public, through a series of crucial elections, rejected the constitutional premises of the Second Republic, and the Supreme Court decided a series of cases that reflected and consolidated a new constitutional settlement with a new set of principles.<sup>108</sup> Because of Ackerman's distinctive theory of constitutional change, both *Lochner* and *West Coast Hotel* can be correct. Indeed, for Ackerman, *Lochner* is simultaneously canonical and anti-canonical. It is anti-canonical because a constitutional moment in 1937 made its reasoning the wrong way to think about the Constitution. It is canonical because its prior correctness bolsters Ackerman's theory of constitutional change.

Sanford Levinson and I have offered a competing theory of constitutional change – partisan entrenchment.<sup>109</sup> We argue that constitutional change occurs because of the way that the separation of powers combines with regular elections to reshape the judiciary over time. The President, checked by the Senate, selects new judges and Justices who interpret the Constitution and develop constitutional doctrine.<sup>110</sup> The political branches replace older jurists with new ones who reflect the vector sum of political forces at the time of their confirmation.<sup>111</sup> Thus, the New Deal settlement occurred because the

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<sup>104</sup> See *id.* at 101-03.

<sup>105</sup> See *id.*

<sup>106</sup> *Id.* at 99-103.

<sup>107</sup> *Id.* at 103-04 (arguing that the New Deal Era gave constitutional legitimacy to “a new vision of activist national government that did not have deep popular roots in our previous constitutional experience”).

<sup>108</sup> 2 ACKERMAN, *supra* note 67, at 380-82.

<sup>109</sup> Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066-83 (2001) [hereinafter Balkin & Levinson, *Understanding the Constitutional Revolution*].

<sup>110</sup> *Id.* at 1068-69.

<sup>111</sup> *Id.* at 1069, 1082.



Democrats kept winning elections throughout the 1930's and eventually replaced all of the older Justices with committed New Dealers.<sup>112</sup> The theory of partisan entrenchment also suggests why *Lochner v. New York* was temporarily eclipsed during the Progressive Era – the most libertarian Justices lost their majority – and why it was revived during the Harding Administration.<sup>113</sup>

The theory of partisan entrenchment, like Ackerman's theory of constitutional moments, offers a positive account of constitutional change, but unlike Ackerman's it does not offer a normative account of the correctness of particular constitutional decisions. At most, it suggests how the system of constitutional change is roughly, but imperfectly, democratic,<sup>114</sup> and this mediated form of popular constitutionalism<sup>115</sup> only partially legitimates it. After all, partisan entrenchment over time might produce serious infringements of constitutional values and democratic institutions. For example, the reaction to Reconstruction in the South and the alignment of interests in the Democratic and Republican Parties after the Civil War produced a Supreme Court that gutted civil rights laws in *The Civil Rights Cases*<sup>116</sup> and gave its blessing to Jim Crow and black disenfranchisement in *Plessy v. Ferguson*<sup>117</sup> and *Giles v. Harris*.<sup>118</sup>

The theory of partisan entrenchment does not demonstrate that the system of constitutional development through judicial review in the United States cannot have serious problems of legitimacy. Instead, it tries to explain the fundamental role that social movements and political parties play in shaping the development of the Constitution through Article III interpretation rather than Article V amendment.<sup>119</sup> People with differing views about what the Constitution means fight over its meaning and seek to embed their views in judicial doctrine, in key legislation, and in other important political acts. In this way constitutional protestantism – the notion that the Supreme Court does not have a monopoly on the correct interpretation of the Constitution –

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<sup>112</sup> See *id.* at 1073.

<sup>113</sup> Bernstein, *Lochner Era Revisionism, Revised*, *supra* note 32, at 10-13 & nn.31-33, 47-48 (dividing the *Lochner* Era into three distinct eras, during which *Lochner* was established, marginalized, and then revived).

<sup>114</sup> Balkin & Levinson, *Understanding the Constitutional Revolution*, *supra* note 109, at 1076.

<sup>115</sup> Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2599 (2004) (arguing that, because of the popular nomination of judges, judicial review is not countermajoritarian).

<sup>116</sup> 109 U.S. 3, 25-26 (1883) (holding the Civil Rights Act of 1875 unconstitutional).

<sup>117</sup> 163 U.S. 537, 551-52 (1896) (upholding state mandated segregation of railway carriages).

<sup>118</sup> 189 U.S. 475, 487-88 (1903) (refusing to intervene in an Alabama disenfranchisement scheme).

<sup>119</sup> See generally Balkin & Levinson, *Understanding the Constitutional Revolution*, *supra* note 109.

becomes an engine of constitutional change.<sup>120</sup> Because the theory of partisan entrenchment offers a largely positive account of constitutional change and only a partial account of legitimation for change, it does not automatically condemn *Lochner* as “wrong the day it was decided.” Given existing constitutional understandings and the political forces at play, the result in *Lochner* was certainly within the range of possible decisions. It may have been wrong, but it was certainly not implausible.

Theories of constitutional change help us understand why some decisions move from the canon to the anti-canon and back. These decisions symbolize key elements of previous constitutional regimes.<sup>121</sup> Some of those elements are still with us, having been synthesized and accommodated in successor regimes. A good example is John Marshall’s flexible approach to federal power in *McCulloch v. Maryland*<sup>122</sup> and *Gibbons v. Ogden*.<sup>123</sup> Other decisions represent elements of past constitutional regimes that have been decisively rejected and now serve as markers of constitutional change. Hence they become lessons about how not to interpret the Constitution according to the present political worldview. *Lochner* became anti-canonical because processes of constitutional change produced a new set of constitutional doctrines that both major political parties eventually accepted and that formed part of the constitutional common sense of a new era.

Political agitation and social movement activism followed by successful elections and judicial appointments change constitutional common sense. They make arguments that were previously considered “off-the-wall,” “on-the-wall,” and vice versa. Shifts in canonical status – from anti-canonical to canonical or canonical but controversial – reflect the political and theoretical struggles over constitutional meaning that characterize a particular era.

Conservative social movements organized in the 1970’s and gained increasing political clout. These developments disturbed and reshaped constitutional common sense, and led to innovative constitutional arguments questioning the premises of the New Deal settlement and the liberal

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<sup>120</sup> Jack M. Balkin, *Idolatry and Faith: The Jurisprudence of Sanford Levinson*, 38 TULSA L. REV. 553, 571-77 (2003) [hereinafter Balkin, *Idolatry and Faith*] (describing the process whereby constitutional dissenters, through political parties and social movement activism, change the meaning of the Constitution in their favor); Jack M. Balkin, *Respect-Worthy: Frank Michelman and the Legitimate Constitution*, 39 TULSA L. REV. 485, 508-09 (2004) [hereinafter Balkin, *Respect-Worthy*] (arguing that political and social movements influence courts through reshaping popular opinion).

<sup>121</sup> See 1 ACKERMAN, *supra* note 9, at 99-104 (describing how *Lochner* fit with the key constitutional elements of its day, only to be discarded when the constitutional regime changed).

<sup>122</sup> 17 U.S. (4 Wheat.) 316 (1819) (upholding the congressional power to create a national bank).

<sup>123</sup> 22 U.S. (9 Wheat.) 1 (1824) (offering a flexible conception of federal commerce power and holding unconstitutional a New York law that granted exclusive rights to steam navigation in New York waters).

interpretation of the Rights Revolution. Not surprisingly, the rise of conservative social movements also spawned new and equally creative attempts by liberals to defend the New Deal settlement and the liberal constitutional agenda. The play of competing arguments reoriented the relationship of previous symbols and landmark decisions. In the process, both critics and defenders found new uses for *Lochner*. These new uses of *Lochner* were motivated by the changed nature of the intellectual debates about judicial review and American constitutionalism. During the 1980's the Reagan Administration strongly criticized regulation and championed free markets. Meanwhile, in the legal academy, economic libertarians like Richard Epstein and Bernard Siegan attempted to rehabilitate the constitutional premises of laissez-faire to attack the constitutional premises of the New Deal regime.<sup>124</sup>

From the perspective of conservative libertarians, employing judicial review to protect freedom of contract and limit government regulation no longer seemed objectionable; indeed, it might be a good idea.<sup>125</sup> Conversely, as we have already noted, in their effort to defend both the New Deal settlement and liberal constitutional values, scholars like Fiss and Ackerman produced theories of constitutional change that historicized previous constitutional regimes and thus were able to accept that *Lochner* made sense in its own time.<sup>126</sup>

Some liberal scholars, like Cass Sunstein, David Strauss, and Laurence Tribe, have continued to argue that *Lochner* was incorrect, but attempted to explain its failures in terms of their own distinctive theories of constitutional law.<sup>127</sup> Sunstein contends that *Lochner* was not wrong because it engaged in judicial activism or recognized unenumerated rights, but because it rested on flawed assumptions about government neutrality.<sup>128</sup> *Lochner* and related cases of the period incorrectly identified government neutrality with government inaction, with respecting the decisions of private parties exercising their common law rights, and with the “preservation of the existing distribution of

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<sup>124</sup> See RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 3-6 (1985) (arguing for broad protection of property rights against government regulation); BERNARD SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 318-22 (1980) (arguing for judicial review of legislation that restricts economic activity); Richard Epstein, *Self-Interest and the Constitution*, 37 J. LEGAL EDUC. 153, 157 (1987) (asserting that *Lochner* was correct because “New York’s maximum-hour legislation was vintage special-interest legislation”).

<sup>125</sup> See SIEGAN, *supra* note 57, at 320-21 (arguing that judicial review of welfare and regulatory legislation “serves the pragmatic interests of society”).

<sup>126</sup> 1 ACKERMAN, *supra* note 9, at 65-67, 99-103; FISS, *supra* note 47, at 389-90; see also *supra* notes 69-86 and accompanying text.

<sup>127</sup> See LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1371 (3d ed. 2000); David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 375 (2003) [hereinafter Strauss, *Why Was Lochner Wrong?*]; Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 874-75 (1987) [hereinafter Sunstein, *Lochner’s Legacy*].

<sup>128</sup> See Sunstein, *Lochner’s Legacy*, *supra* note 127, at 874-75.

wealth and entitlements under the baseline of the common law.”<sup>129</sup> Sunstein argues that these tendencies persist in modern cases involving race equality, sex equality, and campaign finance that he believes are wrongly decided, as well as in the current Supreme Court’s resistance to affirmative government obligations and positive rights under the Constitution.<sup>130</sup> Therefore, rejecting *Lochner* does not mean abandoning judicial attempts to protect important rights, Sunstein has insisted, but rather requires “design[ing] a set of constitutional doctrines that does not derive from common law rules but that instead builds on still-emerging principles that might be roughly associated with the New Deal.”<sup>131</sup>

Laurence Tribe argues that it was permissible for the *Lochner* Court to strike down legislation to protect fundamental constitutional rights – including unenumerated rights.<sup>132</sup> The problem was that the Court had protected the wrong rights:

*Lochner*’s error was essentially that, as a picture of freedom in industrial society, the particular one painted by the Justices drawing on common law categories and the natural law tradition badly distorted the character and needs of the human condition, the reality of the economic situation, and the relationship between political choices and legal rules.<sup>133</sup>

David Strauss agrees with Tribe that the problem with *Lochner* was not that the Court made substantive judgments or protected unenumerated rights. “Freedom of contract,” Strauss explains, “is a plausible constitutional right” that “might merit careful, case-by-case enforcement.”<sup>134</sup> The *Lochner* Court’s vice was that it went too far: “[i]t treated freedom of contract as a cornerstone of the constitutional order and systematically undervalued reasons for limiting or overriding the right.”<sup>135</sup> It made “freedom of contract a preeminent constitutional value that repeatedly prevail[ed] over legislation that, in the eyes of elected representatives, serve[d] important social purposes.”<sup>136</sup> Strauss, a defender of a gradualist common law constitutionalism,<sup>137</sup> believes that the *Lochner* Era Justices’ greatest failing was “a lack of humility: an inability, or refusal, to understand that although they were vindicating an important value, matters were more complicated than they thought.”<sup>138</sup> Although “the Warren Court’s campaign against racial discrimination” justified a “judicial crusade[]

<sup>129</sup> *Id.* at 875.

<sup>130</sup> *Id.* at 875, 918.

<sup>131</sup> *Id.* at 875.

<sup>132</sup> TRIBE, *supra* note 127, at 1370-71.

<sup>133</sup> *Id.* at 1371.

<sup>134</sup> Strauss, *Why Was Lochner Wrong?*, *supra* note 127, at 375.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996).

<sup>138</sup> Strauss, *Why Was Lochner Wrong?*, *supra* note 127, at 386.

on behalf of principles of the highest importance,” “[m]ore often . . . judicial review requires courts to recognize the complexity of the issues they confront and to develop doctrines that, while vindicating constitutional rights, also accommodate values that are in tension with those rights.”<sup>139</sup>

The approach of liberal scholars like Sunstein, Tribe, and Strauss has much in common with the older Progressive interpretation, which viewed *Lochner* as an example of mistaken reasoning that we have wisely rejected.<sup>140</sup> The difference is that these scholars demonstrated the error of *Lochner* to bolster their own defenses of contemporary liberal constitutionalism. By the 1980’s, at least, liberal constitutionalism involved far more than judicial deference in social and economic regulation. It called for both aggressive judicial review in some circumstances and judicial restraint in others, and included, among other things, defenses of the right to abortion, affirmative action, campaign finance regulation, and constitutionally protected welfare rights.

These various uses of *Lochner* exemplify a key characteristic of canonical cases and materials. What makes cases and materials classic and canonical is that they are protean – they can mean many different things to many different people. Therefore people can employ them – whether as negative or positive examples – to support a wide range of different theoretical projects.<sup>141</sup> Classic and canonical cases form key elements of constitutional common sense and the constitutional imaginary; they are tools of understanding what the Constitution means to us.<sup>142</sup> They are enduring not because their meanings do not change, but because their meanings are ever-changing. As new symbolic elements are added to the system, and new constitutional controversies arise, the meaning of existing elements shifts and becomes controversial. Existing elements appear to reorient themselves, forming new and unexpected patterns, revealing new and unexpected similarities and differences. *Brown* disturbed the existing set of meanings of cases in the constitutional canon; so did *Roe v. Wade*, and so too have the Rehnquist Court’s federalism cases.

*Lochner*’s loss of anti-canonical status, in other words, reflects an ongoing constitutional controversy over the New Deal, the Second Reconstruction, and the Rights Revolution that is being fought out simultaneously in the fields of ordinary politics, social movement contestation, judicial decisionmaking, activist lawyering, and academic argument, with each of these fields of contest having multiple connections and paths of influence to the others. What is at

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<sup>139</sup> *Id.*

<sup>140</sup> Friedman, *Countermajoritarian Difficulty*, *supra* note 39, at 1387, 1402-28 (describing popular attacks on the conservative judiciary from 1895 to 1924).

<sup>141</sup> See Levinson, *Why I Don’t Teach Marbury*, *supra* note 18, at 575-76 (“concurring and dissenting opinion” of Jack M. Balkin) (describing *Marbury* as a “classic” that “can speak in ever new ways to us no matter what our theoretical preoccupations of the moment”).

<sup>142</sup> See Balkin & Levinson, *The Canons of Constitutional Law*, *supra* note 13, at 1002-03.

stake in the debate over whether *Lochner* was rightly decided in its time is the legitimacy of a particular set of doctrines and results in our own time.

Citizens, social movements, and political parties are continually arguing for their favored interpretations of the Constitution, usually claiming that these are forms of restoration to proper principles or are true to the nature of the country. In so doing, they disturb constitutional common sense and the symbolic meaning of elements in the constitutional canon. *Lochner*'s loss of anti-canonical status thus reflects a shift in constitutional common sense, partly due to a new generation of conservatives and libertarians who see the benefits of a theory of limited government at both the national and state levels. As we have seen in the work of Ackerman and Fiss, *Lochner*'s rehabilitation may also reflect the development of increasingly sophisticated defenses of the New Deal and the Second Reconstruction that employ *Lochner*'s plausibility as proof of a theory of legitimate constitutional change through living constitutionalism, constitutional evolution, mediated popular constitutionalism, or constitutional moments.

If conservative social movements continue their ascendancy and the conservative wing of the Republican Party gains and maintains its political hegemony, constitutional common sense will be altered for good, and this, in turn, will reorient the legal and symbolic meanings of *Lochner*. That does not mean that we will return to the philosophy of limited government characteristic of the Second Republic. However much revolutionaries phrase their arguments in terms of a restoration of original understandings and first principles, they reshape the present rather than return to the past. The past is past and will not return to us. Rather, we will see a new hybrid of conservative constitutional principles grafted onto the work of the antebellum Constitution, the Reconstruction Constitution, the New Deal Constitution, and the Second Reconstruction Constitution, altering some elements, discarding others, and changing the symbolic significance of still others. In this sense, Ackerman's notion of constitutional interpretation as the synthesis of different generation's understandings is apt.<sup>143</sup> What is synthesized, of course, is not the understandings of those past generations, but each generation's successive understanding of itself and its understandings of what previous generations fought for and believed in. Synthesis, like revolution, however much oriented toward the past, always occurs in the present and is always directed toward the future. Constitutional history and the constitutional imagination are artifacts of the present shaped from imagined materials in the past.

### III. *LOCHNER* AND CONSTITUTIONAL ETHOS

Still another way to approach the question of whether *Lochner* was correctly decided is in terms of constitutional ethos – the community's self-conception of its values and commitments, and the stories that it tells about itself to

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<sup>143</sup> 1 ACKERMAN, *supra* note 9, at 86-99.

itself.<sup>144</sup> To understand the role that ethos plays in shaping our judgments of constitutional correctness and mistake, one need only compare *Lochner v. New York* to *Plessy v. Ferguson*, a decision which is still very much part of the anti-canon. Although, as we have seen, it has become increasingly acceptable for scholars on both the left and the right to acknowledge that *Lochner* may have been rightly decided in its own time, it is still very difficult for most scholars to make the same claim about *Plessy*. That is not, however, because there is any lack of legal arguments to support such a claim.<sup>145</sup>

As a doctrinal matter, *Plessy* follows fairly naturally from the Supreme Court's 1883 decision in *Pace v. Alabama*,<sup>146</sup> which upheld provisions of a state code that punished interracial cohabitation more severely than cohabitation between persons of the same race.<sup>147</sup> The provisions did not discriminate on the basis of race, the Court explained, because “[t]he punishment of each offending person, whether white or black, is the same.”<sup>148</sup> After *Pace*, *Plessy* was not a particularly difficult case, and indeed, the decision was 7-1. The only dissenter was Justice Harlan, who had joined the unanimous decision in *Pace*. *Pace* turns on the distinction between civil, political, and social equality. The Fourteenth Amendment was generally believed to guarantee civil equality but not political or social equality for African-Americans; political equality was secured only by the ratification of the Fifteenth Amendment in 1870. Because marriage and cohabitation were paradigmatic issues of social equality, the power of states to regulate them was (presumably) unaffected by the Reconstruction Amendments and hence states could discourage mixing of the races. Indeed, from one perspective, the central issue in *Plessy* is whether social interactions on railroads are an attribute of civil or social equality. Harlan maintained that they were matters

<sup>144</sup> PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 106-07, 125-26, 157-63 (1982) (describing the nature of arguments about constitutional ethos); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-13, 20-21 (1991) (same); J.M. Balkin, *The Declaration and the Promise of a Democratic Culture*, 4 WIDENER L. SYMP. J. 167, 175-80 (1999) (describing the nature of narrative arguments about the Constitution).

<sup>145</sup> See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 9-10 (2004) (“*Plessy*-Era race decisions were plausible interpretations of conventional legal sources;” they did not “butcher[] clearly established law or inflict[] racially regressive results on a nation otherwise inclined to favor racial equality.”). Mark Graber has argued much the same about *Dred Scott v. Sandford*. See GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL, *supra* note 9 (arguing that *Dred Scott* was premised on plausible legal arguments from the standpoint of 1857); Graber, *Desperately Ducking Slavery*, *supra* note 9, at 315 (“The justices in the *Dred Scott* majority relied on institutional, historical and aspirational arguments that, while often strained, were not substantially weaker from a pure craft perspective than the institutional, historical and aspirational arguments made by the dissenters in *Dred Scott*.”).

<sup>146</sup> 106 U.S. 583 (1883).

<sup>147</sup> *Id.* at 585.

<sup>148</sup> *Id.*

of civil equality,<sup>149</sup> while the majority argued that they were aspects of social equality.<sup>150</sup> It is fairly easy to understand why privileged whites in 1896 might have viewed intermingling of whites and blacks in places of public accommodation, often in crowded conditions, as aspects of social equality.

Nevertheless, few scholars, even those who accept the soundness of *Lochner*, are willing to agree that *Plessy* too might have been rightly decided in its time. Both Ackerman and Fiss treat *Plessy* somewhat differently from *Lochner*. Fiss acknowledges that *Plessy* is consistent with Supreme Court precedents, beginning with the 1883 *Civil Rights Cases*, and that its logic is well within the “traditional contractarian framework” also employed in *Lochner*.<sup>151</sup> Despite this, Fiss does not conclude that *Plessy* was correctly decided. Indeed, his chapter discussing the case is entitled, “*Plessy*, Alas.”<sup>152</sup>

Like Fiss, Ackerman believes that the logic of *Plessy* was exploded by the New Deal and the rise of the activist state.<sup>153</sup> By the 1930’s, one could no longer assume that the state played no role in constructing the social meaning of segregation and that civil equality could be easily distinguished from social equality.<sup>154</sup> Although Ackerman argues that overruling *Plessy* in *Brown* was required by the constitutional assumptions of the New Deal,<sup>155</sup> he does not explicitly state the converse: that prior to the New Deal, the result in *Plessy* was required by the Reconstruction Constitution. In the second volume of *We the People*, Ackerman spends several pages rejecting Michael McConnell’s suggestion that a constitutional moment occurred between Reconstruction and 1896 that justified *Plessy* and Jim Crow.<sup>156</sup> Ackerman acknowledges that “American institutions increasingly failed to preserve the commitments previously made by the People to black Americans.”<sup>157</sup> But “[i]f we hope to understand the tragic failure to live up to the amendments,”<sup>158</sup> Ackerman believes, one must consider whether “the Supreme Court betray[ed] its task of preserving constitutional commitments during normal politics”<sup>159</sup> or whether there was “something inherently defective in the approach to racial justice

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<sup>149</sup> See *Plessy v. Ferguson*, 163 U.S. 535, 559, 563-64 (1896) (Harlan, J., dissenting).

<sup>150</sup> See *id.* at 551-52 (“If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.”).

<sup>151</sup> FISS, *supra* note 47, at 359-61.

<sup>152</sup> *Id.* at 352.

<sup>153</sup> 1 ACKERMAN, *supra* note 9, at 146-47.

<sup>154</sup> *Id.* (“The New Deal Court recognized the government as an active contributor to the process by which groups made their ‘choices’ in American society.”).

<sup>155</sup> *Id.* at 146, 150.

<sup>156</sup> 2 ACKERMAN, *supra* note 67, at 471-74 n.126.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*



taken by the amendments.”<sup>160</sup> In the first case, *Plessy* would have been wrongly decided in its time; in the second case it would have been a correct expression of the legal consciousness of the Second Republic. Ackerman poses but does not resolve this question, leaving it to a future discussion.<sup>161</sup> Ackerman and Fiss’s treatment of *Plessy* is hardly surprising. Stating forthrightly that *Lochner* was correct is very different from asserting that *Plessy* was correct, and comparing a judge’s or a scholar’s reasoning to that in *Plessy* still constitutes fighting words.

*Plessy* has had a different fate from *Lochner* for two reasons. First, although the struggles over the New Deal have receded into the past, *Brown v. Board of Education* and the Second Reconstruction are much closer in time. In some ways, people still feel about *Plessy* the same way that people felt about *Lochner* in the 1950’s and 1960’s. That suggests that, fairly soon in the future, acknowledging *Plessy*’s reasonableness in its historical context will seem less fraught than it does today. There is an additional dynamic at work, however. Aspects of the Second Reconstruction remain controversial in ways that the New Deal settlement has not. Busing, affirmative action, voting rights, and the role of race in the criminal process still divide liberals and conservatives even though they all presume the correctness of *Brown*. They disagree about what *Brown* meant or should mean. *Plessy*’s anti-canonical status – the ritual practice of showing why *Plessy* was wrong – not only serves to legitimate the changes in constitutional common sense that *Brown* brought in its wake; it is also a way of articulating and defending still controversial positions about the true premises of the Second Reconstruction. When liberals and conservatives fight over the legacy of *Brown*, they accuse each other of adopting reasoning reminiscent of *Plessy*.<sup>162</sup> It is precisely because *Brown*’s legacy remains unclear and contested that *Plessy* must remain anti-canonical.

The second reason is related to the first. As I noted previously, behind every canonical case is a canonical narrative about the progress of the Court and the country. *Plessy* must be “wrong the day it was decided” because of this story. *Plessy* must always have been inconsistent with the meaning of the Fourteenth Amendment and with the premises of the Reconstruction Constitution. To believe otherwise would be to accept facts about our country that are painful to accept. We do not want *Plessy* to have been right – regardless of the constitutional common sense of the period in which it was

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> See Jack M. Balkin, *Brown v. Board of Education: A Critical Introduction*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION* 12-14 (Jack M. Balkin ed., 2001); see also *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 631-32 (1990) (Kennedy, J., dissenting) (comparing the upholding of an affirmative action plan to the logic of *Plessy*); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 402 (1978) (Marshall, J., dissenting) (arguing that the Court had “come full circle” back to *Plessy* by using its power to hinder the promotion of racial equality).

decided – because we do not want to be the sort of country in which *Plessy* could have been a faithful interpretation of the Constitution.

We say that a case like *Plessy* was wrong the day it was decided in order to avoid concluding that we are the type of people whose Constitution would say such a thing. The case does not reflect our nature or who we are. It is not *our* Constitution. This conclusion is an expression of ethos or national character. The case must be a mistake of constitutional reasoning because we cannot accept that it reflected the nature of America. *Dred Scott* presents similar problems; it simply cannot have been correctly decided. That remains true even though *Dred Scott* was overturned by explicit constitutional amendment, so that there would be no logical contradiction in its having been right in its own time.<sup>163</sup> *Dred Scott* cannot have been right in its own day because we do not want to be the sort of country it which it could have been right. Even though we freely acknowledge that slavery was legal in the United States until 1865, we do not wish to accept that *Dred Scott* was correct.<sup>164</sup>

*Lochner* does not, at least in our own era, raise the same qualms about the nature of the country. It is somewhat easier to accept that reasonable people once believed in a limited conception of the police power and doubted that states had the authority to create redistributive regulations. By contrast, we cannot accept the casual racism of *Plessy* as reasonable, not because we do not understand that reasonableness is conditioned by history, but because we do not want it ever to have been our reasonableness.

To be sure, acknowledging that *Plessy* was rightly decided in its own era might be an appropriate way of taking responsibility for who we are and where we came from. It admits that we were once a nation premised on racial inequality and racial ideologies.<sup>165</sup> However, the resistance to that acknowledgment is tied up in deeper things than historical accuracy or logic.

Thus, *Plessy*'s loss of anti-canoncity would be far more troubling and disturbing than *Lochner*'s because of the reigning narratives that have a hold on us about the meaning of our Constitution and our deepest commitments as a nation. Moreover, if we concede that *Plessy* was correct in its own day, the problem of constitutional change would press itself on us even more forcefully.

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<sup>163</sup> Cf. Frank I. Michelman, *Concurring in Part and Concurring in the Judgment*, in WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID, *supra* note 162, at 124, 130 (deciding *Brown v. Board of Education* correctly requires “explaining American affairs of race during the Constitution’s first seventy-five years as a visionary eclipse or occlusion”).

<sup>164</sup> Graber, *Desperately Ducking Slavery*, *supra* note 9, at 271 (“No one . . . wishes to rethink the universal condemnation of *Dred Scott*.”).

<sup>165</sup> This is the pedagogical justification for historicism offered in BREST, LEVINSON, BALKIN & AMAR, *supra* note 10, at xxxii; see also Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987) (arguing that it is important to remember that the Constitution drafted in Philadelphia “was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today”).

If *Plessy* was consistent with the Fourteenth Amendment in 1896, what changed that made *Brown* legitimate in 1954? What authorized the Supreme Court to reject a precedent of sixty years standing that was a correct interpretation of the Fourteenth Amendment the day it was decided?<sup>166</sup>

#### IV. *LOCHNER* AND CONSTITUTIONAL HISTORICISM

As should be clear from the discussion so far, I have not offered my own opinion on whether *Lochner v. New York* was rightly decided in 1905. Instead, I have used this question to explore some questions about contemporary constitutional theory – how we create the constitutional canon, what constitutional stories we tell about ourselves, and how we justify constitutional change. In posing these questions, I have employed a particular constitutional theory of my own – constitutional historicism. Constitutional historicism holds that the standards of good and bad legal argument about the Constitution change over time in response to changing social, political, and historical conditions. Not only does doctrine itself change over time, but also the constitutional common sense that allows well-socialized lawyers to recognize what is a better and worse argument, what is a plausible interpretation of the Constitution and what is “off-the-wall.” Historicism does not deny the felt constraint of legal materials on well-socialized lawyers and judges at a particular point in time. Otherwise, the very distinction between the plausible and the “off-the-wall” would make no sense. Instead, it argues that legal materials and legal conventions, and particularly those that apply in constitutional cases, offer sufficient flexibility to allow constitutional argument to be a site for political and social struggle. Through these struggles, the internal conventions of constitutional argument and the constitutional common sense of a particular historical period are reshaped.<sup>167</sup>

In this final part of the essay, I want to turn the question of whether *Lochner* was rightly decided back onto the very method I have used in this essay. I want to use this question to interrogate and critique the premises of constitutional historicism. Constitutional historicism is a kind of critical theory – put most simply, it uses the methods of reason to question the practices of reason. All critical theories are potentially self-referential – one can always apply them to themselves, or, more precisely, one can apply their methods to

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<sup>166</sup> This presents a problem for historicist approaches to constitutional law precisely because we now live in a post-civil rights era. Because most Americans are now committed to basic principles of racial equality and regard past racial practices as illegitimate, people in our era do not want to believe that *Plessy* was correctly decided in its day. They want to believe that it was always inconsistent with our Constitution following the ratification of the Fourteenth Amendment, so that *Brown* can represent a restoration to the Constitution’s true spirit. Put another way, people want *Plessy* to have been wrong the day it was decided because of what a contrary conclusion would mean about our country and about who we are.

<sup>167</sup> See Balkin & Levinson, *Legal Historicism*, *supra* note 10, at 174, 181; see also BREST, LEVINSON, BALKIN & AMAR, *supra* note 10, at xxxi-xxxii.

consider and critique the ways in which those methods are employed in practice. Application of a critical method to itself is not a refutation of the method. To the contrary, it is an important way of honing the theory and gaining enlightenment.<sup>168</sup>

Recently, Mark Tushnet has argued that historicism disables legal scholars from arguing that legal decisions of the past are rightly or wrongly decided from a legal perspective, although we can certainly criticize them politically or ethically from our own present perspective.<sup>169</sup> As Tushnet explains, “[t]he historicist sensibility pushes us to ask: Given the historical circumstances in which people found themselves, how could they do otherwise?”<sup>170</sup> His argument is straightforward. People who live in a particular era and are trained as lawyers understand the merits of legal claims in ways characteristic of being well-socialized lawyers of that particular era. The legal decisions of that period reflect the fact that they were argued over and produced by legal minds subject to those particular historical circumstances. Lawyers and judges reached the conclusions they did because they were well-socialized lawyers living in that particular era and that is how lawyers thought.<sup>171</sup> Tushnet gives the example of the constitutional and legal defense of slavery in the antebellum South. “[W]ell-socialized lawyers, who weren’t, as it appears from the evidence, moral monsters generally, [were perfectly able to] think themselves into a position of defending, or at least developing the legal structure for, one institution that was morally monstrous.”<sup>172</sup> That is not because they systematically got the law wrong, but rather, because, living in the time they lived in, that is how a well-socialized lawyer understood what the law required, and arguments to the contrary were either poor legal arguments or totally “off-the-wall.” If so, how can one criticize the products of that period as wrongly decided? “[A]s well-socialized professionals . . . the antebellum Southern lawyers . . . did the only thing they could do. They were socialized to the point that what they did was fully determined by their social role.”<sup>173</sup>

One can easily see how Tushnet’s views might apply to *Lochner*. It is not for us to claim that *Lochner* was a bad example of legal reasoning, although some may find the case politically atrocious. If we had lived in that period and been the sort of person who might rise to become a Supreme Court Justice, we would have thought about the Constitution, the proper role of government, and the proper role of the judiciary pretty much the same way that Justice Peckham

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<sup>168</sup> On the importance of self application of critical methods, see generally JACK M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* (1998) [hereinafter BALKIN, *CULTURAL SOFTWARE*]; MALCOLM ASHMORE, *THE REFLEXIVE THESIS: WRIGHTING SOCIOLOGY OF SCIENTIFIC KNOWLEDGE* (1989).

<sup>169</sup> See Mark Tushnet, *Self-Historicism*, 38 *TULSA L. REV.* 771, 773-75 (2003).

<sup>170</sup> *Id.* at 774.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 773.

<sup>173</sup> *Id.* at 774.

did. The best evidence for the correct legal decision in *Lochner v. New York* is the actual result in *Lochner v. New York*, because it was produced by well-socialized lawyers imbued with the legal consciousness of the early twentieth century. If we had been on the Supreme Court in 1905, we probably would have approached the issues in a similar fashion. To be sure, *Lochner* was a close case – it was decided 5-4. But that suggests that it was a close case under the reigning assumptions of well-socialized lawyers of the day. It does not suggest that the entire set of assumptions shared by the Justices about limited government, the contours of the police power, and the role of judges was wrong in the way that critics since the New Deal have argued. The Court’s reasoning in *Lochner* simply reflected how well-trained elite lawyers in 1905 understood the relationships between common law rights and individual liberty, the police power and the social contract, and the judiciary and legislatures, however much we may disagree from our contemporary vantage point. Indeed, if we offered our present day perspectives and our fancy constitutional theories to an audience of well-socialized lawyers of the *Lochner* period, they would regard our views as not only wrong, but wildly wrong, “off the wall,” and outside the bounds of reasonable argument.

Tushnet’s claim, in short, is that if one is really committed to historicism, it usually makes little sense to dispute how cases from the past, and particularly the distant past, should have been decided according to the internal legal norms of the day. It is likely that in most cases, the judges or Justices did the best that they could do, given who they were and how they were socialized as lawyers living in a particular period with its own distinctive legal consciousness. Recently, I asked a number of legal scholars, including Tushnet, to write legal opinions for a book entitled “*What Roe v. Wade Should Have Said*.”<sup>174</sup> I asked them how they would have decided *Roe* given the materials available in 1973. Tushnet, consistent with his commitment to historicism, submitted a lightly edited version of Justice Douglas’s concurrence in *Doe v. Bolton*,<sup>175</sup> the companion case to *Roe*.<sup>176</sup> Given the legal conventions of the day, Tushnet explained, that was probably the best that anyone who might plausibly have been a Supreme Court Justice in 1973 could have done.<sup>177</sup> In particular,

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<sup>174</sup> WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S MOST CONTROVERSIAL DECISION (Jack M. Balkin, ed. 2005) [hereinafter WHAT *ROE V. WADE* SHOULD HAVE SAID].

<sup>175</sup> 410 U.S. 179 (1973) (holding unconstitutional provisions of Georgia’s abortion law).

<sup>176</sup> See Mark Tushnet, *Concurring in the Judgment*, in WHAT *ROE V. WADE* SHOULD HAVE SAID, *supra* note 174.

<sup>177</sup> Mark Tushnet, *Contributor’s Note*, in WHAT *ROE V. WADE* SHOULD HAVE SAID, *supra* note 174. By contrast, Reva Siegel offered an equality argument for *Roe* based on the amicus briefs in *Roe* and *Doe* submitted by second wave feminists. Reva Siegel, *Concurring*, in WHAT *ROE V. WADE* SHOULD HAVE SAID, *supra* note 174; Reva Siegel, *Contributor’s Note*, in WHAT *ROE V. WADE* SHOULD HAVE SAID, *supra* note 174. While Tushnet looks only to the sorts of possible arguments that a sitting Supreme Court Justice might have made in 1973, Siegel looks to the broader set of resources available in American

Tushnet argued that it was unrealistic to believe that the Justices in 1973 would have understood or embraced an Equal Protection justification for a woman's right to abortion.<sup>178</sup> Justice Harry Blackmun, the author of *Roe*, said much the same thing.<sup>179</sup> If one is a thoroughgoing historicist in Tushnet's sense, there may be no point to having an anti-canon of negative examples, other than to acknowledge the brute fact that times have changed.

Nevertheless, one might object that historicism need not be so deterministic. After all, historicism recognizes, indeed it insists, that legal materials are a site of struggle between various groups in society, so that "legal materials and conventions are open to alternative interpretations even within a particular legal culture."<sup>180</sup> In this way, even lawyers in the antebellum South might have been exposed to legal arguments against slavery, and we can criticize them for "reject[ing] normatively more appealing arguments that were in fact available within the legal culture. They could have adopted the arguments and remained well-socialized lawyers, and the fact that they did not opens them up to moral criticism."<sup>181</sup> Tushnet responds that although alternative arguments may have been available to lawyers, "these people were not only lawyers, but also sons and fathers, merchants and slave-owners, and so on through a long list of social roles they occupied."<sup>182</sup> It is "conceptually possible, but empirically unlikely, that the socialization into all of the roles of a person who defended slavery still left room for reflection and choice."<sup>183</sup> Instead, it is more likely that "once we understand everything about the defender of slavery, we'll see how the cumulation of all his roles made it impossible for him to choose any course other than the one he pursued."<sup>184</sup>

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legal culture.

<sup>178</sup> Tushnet, *Contributor's Note*, *supra* note 177.

<sup>179</sup> HARRY A. BLACKMUN, THE JUSTICE HARRY A. BLACKMUN ORAL HISTORY PROJECT: INTERVIEWS WITH JUSTICE BLACKMUN CONDUCTED BY PROFESSOR HAROLD HONGJU KOH, YALE LAW SCHOOL 202 (Transcript of a series of interviews recorded at the U.S. Supreme Court and the Federal Judicial Center between July 6, 1994 and Dec. 13, 1995) (stating that *Roe* "could not have been decided back in 1972-73" on equal protection grounds because Justice Douglas was "dead set" against it), at <http://lcweb2.loc.gov/cocoon/blackmun-public/series.html?ID=D09> (last visited Mar. 18, 2005).

<sup>180</sup> Tushnet, *Self-Historicism*, *supra* note 169, at 774; *see also* Robert C. Post, *Foreword: Fashioning The Legal Constitution: Culture, Courts, And Law, The Supreme Court 2002 Term*, 117 HARV. L. REV. 4, 10, 83, (2003) [hereinafter Post, *Foreword: Culture, Courts, And Law*] (noting the contestable nature of constitutional culture); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 303-04, 322-25 (2001) [hereinafter Siegel, *Text in Contest*] (describing the role of social movements in making constitutional claims and contesting the existing understandings).

<sup>181</sup> Tushnet, *Self-Historicism*, *supra* note 169, at 774.

<sup>182</sup> *Id.* at 775.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

Tushnet's position might seem to lead to the view that cases were almost always rightly decided in their time, or, at the very least, were almost always highly plausible decisions in their own time. That is because the sorts of people who would be in a position to make key constitutional decisions would be socialized in ways that would greatly constrain their ability to choose alternative courses of action. It also suggests that although we might criticize the legal decisions of previous generations from our own moral and political standpoint, we cannot hold previous generations morally or politically responsible for deciding legal cases as they did because the cumulation of social forces and roles made it very difficult, if not impossible, for them to choose any other course than the one they pursued.

I do not, however, believe that this is where historicism inevitably leads. It is true that a historical sensibility will allow us to see how the work of lawyers and judges in previous eras made more sense than we might otherwise give credit for. But, it does not follow that the best evidence that a case was rightly decided – or, in Tushnet's terms, could not have been otherwise decided given the social formation of the day – was that it was actually decided in a certain way.

There is reason to doubt this view precisely because it makes no sense with respect to the constitutional jurisprudence of our own era, and there is no reason to believe that our era is particularly special in this regard. We do not generally assume that the shared presuppositions of well-socialized lawyers dictate a single clear outcome in controversial Supreme Court cases. And we do not generally assume that judges and Justices usually reach the best possible decision given the available legal materials and legal conventions. Rather, we routinely criticize the work of judges and Justices when they fail to match our own views about the best interpretation of the Constitution.

To be sure, social and political forces clearly constrain who might reasonably be expected to be appointed to the judiciary. But we cannot assume, as Tushnet does, that these constraints foreclose any significant divergence of opinion about constitutional questions. Even among the comparatively small group of elite lawyers with connections to the politically powerful, we will find a wide range of possible views. We experience judicial appointments in our own era as subject to every sort of contingency, even given the particular administration in power. Moreover, given that who wins the Presidency often turns on a wide range of contingencies, a very different cast of characters might have inhabited the federal courts and the Supreme Court depending on, for example, the shift of a hundred thousand votes in Illinois and Texas in 1960, or in Ohio in 2004. Similarly, a justice might die of a heart attack at a crucial moment and be replaced by a jurist with very different views, thus altering the course of legal decision-making for a generation.

In hindsight, we can see how cause led to effect, and how the levers of power were seized by one group of persons rather than another, with fateful consequences for the direction of constitutional development in this country.

But in the present moment, we understand that there are choices to be made, and that we can rightly criticize people for taking the wrong positions and making the wrong choices.

Because there is no reason to believe that our era is special in this respect, our experience of dissensus and contingency is unlikely to be unique to our present moment. Instead, well-socialized lawyers who lived in the past probably experienced something very similar: a wide range of possible people could have been in a position to make key decisions, and among that group of possible decision-makers there were probably a wide range of possible views about what the Constitution means. This is so even if that spectrum of views is quite different from the set of plausible views held by well-trained lawyers today.

Tushnet's account of historicism is insufficiently dynamic. Political agency can produce changes in constitutional common sense and constitutional culture, which in turn opens up the space of possible future constitutional decisions. To the extent that social movement contestation and political agency are possible, so too are changes in constitutional culture.<sup>185</sup>

A second problem is that Tushnet's account views legal culture as largely constraining rational discourse. Normative judgments "arise out of the social, political and economic circumstances of the people making them,"<sup>186</sup> and if people change their minds about normative questions, it is probably because of changes in those circumstances rather than because they were independently "rationally motivated."<sup>187</sup> "Historicism," Tushnet explains, "asks us to question the degree to which reason and choice play roles in human action."<sup>188</sup> My view, in contrast, is that culture enables and empowers rationality and freedom as well as limiting and constraining them.<sup>189</sup> Reason, or rather forms of reason, are produced by and through culture. We are able to think through problems because of the resources that culture gives us. Culture produces freedom and degrees of freedom. Culture enables rationality and forms of rationality. Historicism, in my view, does not deny that reason and choice play central roles in human action. Rather, it asks what kinds of reason and resources of reason exist at a particular time and how people made choices and exercised their freedom under these circumstances. The question is not whether people in the past were free, creative agents, but what their freedom consisted in and how the tools of understanding available at that particular point in time enabled them to be creative in some ways rather than in others.

To make these points about dynamism and freedom within legal culture more clear, we need a more precise vocabulary to talk about the experience of

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<sup>185</sup> Of course, Tushnet might respond that the possibilities of political agency are also quite limited.

<sup>186</sup> Tushnet, *Self-Historicism*, *supra* note 169, at 776.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 777.

<sup>189</sup> See BALKIN, *CULTURAL SOFTWARE*, *supra* note 168, at 288-94.



contingency and dissensus in a constitutional culture at a given time. We might distinguish between several different properties a legal position might have, as viewed from the perspective of a well-socialized lawyer:

- (1) The position is “off-the-wall.” It is inconsistent with the key assumptions of the legal culture and is not the sort of argument one would expect a well-trained lawyer to make. Lawyers who make such an argument are either poor lawyers, ideologues pushing a political agenda, or deliberately trying to be provocative.
- (2) The position is wrong.
- (3) The position is plausible, but ultimately not the best argument.
- (4) There are plausible arguments both ways, and it is genuinely unclear which decision is best.
- (5) There are plausible arguments both ways, but on balance the position is probably correct.
- (6) The position is correct.
- (7) The position is so clearly correct that the opposite conclusion would be inconsistent with the basic assumptions of the legal culture. It would be “off-the-wall.”

Lawyers will not necessarily agree into which category a particular position fits, but being a well-socialized lawyer involves being able to make judgments about what is clearly correct and what is “off-the-wall,” judgments about which directions one might push to vindicate a client’s interests, and judgments about which sorts of arguments are unlikely to succeed.

The fact that legal authorities reach a particular decision does not mean that the decision is the only one that could be reached. It does not even mean that the decision was plausible at the time. The official in question could have been bribed, subject to a conflict of interest, or unduly motivated by political agendas. Indeed, in some cases a Supreme Court decision may appear to a large segment of professionally trained lawyers as quite poorly reasoned, and in a small number of cases, completely “off-the-wall.” For many liberal lawyers, *Bush v. Gore*<sup>190</sup> is the most recent example of such a case. John Hart Ely once said of *Roe v. Wade* that it is not constitutional law and “gives almost no sense of any obligation to try to be.”<sup>191</sup> The Rehnquist Court’s federalism cases were shocking to many liberal professors in recent years, just as the reasoning of some Warren Court decisions had seemed beyond the pale to some professors at the Harvard Law School.<sup>192</sup>

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<sup>190</sup> 531 U.S. 98 (2000).

<sup>191</sup> Ely, *The Wages of Crying Wolf*, *supra* note 23, at 947.

<sup>192</sup> William M. Wiecek, *American Jurisprudence after the War: “Reason Called Law,”* 37 *TULSA L. REV.* 857, 871-75 (2002) (noting the “barrage of criticism” leveled at the Warren Court by Harvard Law professors); L.A. Powe, Jr., *The Supreme Court, Social*

We must take a dynamic perspective if we want to understand what sorts of decisions are possible within a given legal culture at a particular period of time. Although an opinion may seem “off-the-wall” initially, it may become part of constitutional common sense, especially if it forms part of the law that lawyers must rely on and use in later cases. Decisional law becomes part of the furniture, so to speak, and lawyers have to live with it. And lawyers are nothing if not adaptable. They are trained in the arts of rational reconstruction, moving all of the pieces around on the board in order to make room for the latest arrival.<sup>193</sup> Thus, although a decision may initially be considered “off the wall” at first, lawyerly opinion may change over time as lawyers busily seek to normalize it and make it make sense within the existing body of precedents. Within a relatively short span of time, the federalism decisions of the New Deal were normalized, and so too have the federalism decisions of the Rehnquist Court. By taking positions that might previously have been thought “off-the-wall,” and forcing lawyers to argue about them repeatedly, key decision-makers can shift the understanding of well-socialized lawyers.

To summarize: we do not have a simple set of on-off categories to describe legal positions, but rather a spectrum of possibilities. Moreover, the characterization of positions along this spectrum is in flux and is subject to the agency of importantly placed individuals. It is continually affected by social, economic, political, and cultural forces, by who enters the legal profession at a particular moment, and by what sorts of controversies seize the public imagination. The characterization of positions along the spectrum of plausibility is also affected by social movement activism and by the willingness of certain members of the bar, or certain important political figures, to support a particular position and put their credibility or authority behind it. By making and supporting constitutional arguments repeatedly, people can disturb settled understandings and create new ones. Through political activism and legal advocacy, determined parties can push positions from being “off-the-wall” to being “on-the-wall.”<sup>194</sup> Indeed, this is the

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*Change, and Legal Scholarship*, 44 STAN. L. REV. 1615, 1640 (1992) (describing Justice Frankfurter’s influence on Harvard Law Review Forewords critical of the Warren Court).

<sup>193</sup> Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1447 (2001) (noting how lawyers adjust and rationalize decisions, even those once considered “off-the-wall”); *see generally* Mark Tushnet, *Renormalizing Bush v. Gore: An Anticipatory Intellectual History*, 90 GEO. L.J. 113 (2001) (predicting how the legal profession will rationalize *Bush v. Gore* to avoid cognitive dissonance and the conclusion that law has been corrupted by politics).

<sup>194</sup> Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, *supra* note 193, at 1444-47 (describing the role of political and professional influence in shaping what is regarded as legally plausible); Balkin, *Idolatry and Faith*, *supra* note 120, at 567-68 (identifying the role of social movements in changing what is “off-the-wall” and “on-the-wall”); Balkin, *Respect-Worthy*, *supra* note 120, 507-09 (arguing that social movement contestation and political agitation help shape what is considered reasonable and what is regarded as “off-the-wall”); Siegel, *Text in Contest*, *supra* note 180, at 303-04, 322-25

standard story of most successful social movements. Social movement claims about the Constitution generally move through the spectrum of possibilities listed above. In the first stage, social movement claims are largely ignored by the general public and most lawyers, and to the extent they are recognized, they are rejected as "off-the-wall." In the second stage, they are wrong but interesting, in the third stage they have become plausible but wrong, in the fourth stage they have become roughly as plausible as their competitors, and in the fifth stage they are not only plausible but probably right. When a social movement has truly succeeded, at least some of its interpretations have reached the sixth and seventh stages. They have become part of constitutional common sense, and those who doubt them are regarded as reactionary and themselves "off-the-wall."<sup>195</sup>

Tushnet is right to focus on socialization as structuring the possible constitutional discourse of a particular era, but constitutional socialization is dynamic rather than static. It is perpetually contested and many of its features are up for grabs.<sup>196</sup> When one element is altered the possibility arises of altering others that had previously seemed foundational and beyond question. Our constitutional common sense is a public good continually being refreshed and recreated; it is a joint product of political and legal agency that continually evolves over time.

What does this mean for our judgments about whether *Lochner* might have been decided otherwise, and whether we may justly criticize the Justices for deciding the case the way that they did? We might begin by noting that in its own era *Lochner* was a close case.<sup>197</sup> There are good reasons to think that the case could have gone either way. Peckham's majority opinion and Harlan's dissent shared many assumptions about the police power and judicial review, although Peckham was somewhat more of a libertarian.<sup>198</sup>

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(2001) (describing the role of social movements in changing existing understandings of constitutional norms).

<sup>195</sup> Cf. William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. (forthcoming 2005) (manuscript at 117, on file with the Yale Law Journal) (describing how identity-based social movements change public perceptions of themselves over time); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 468-91 (2001) (offering a general account of how identity-based social movements succeed in changing legal norms); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2069-72 (2002) (noting the forms of constitutional argument employed by successful identity-based social movements).

<sup>196</sup> See Post, *Forward: Culture, Courts, And Law*, *supra* note 180, at 10, 83; Siegel, *Text in Contest*, *supra* note 180, at 303-04, 322-25.

<sup>197</sup> By contrast, *Plessy v. Ferguson* may not have been as close a case as *Lochner*, at least if the 7-1 vote is any indication.

<sup>198</sup> Bernstein, *Lochner Era Revisionism, Revised*, *supra* note 32, at 10 n.31, 45 (noting that Justices Peckham and Brewer were the most radical libertarians on the *Lochner* Court,

The true outlier in *Lochner v. New York* is Justice Holmes, who does not join Harlan's dissent. Holmes rejects the premises of limited government and police power jurisprudence and offers what is essentially a parliamentary model of democracy: the legislature can do whatever it likes.<sup>199</sup> Judged solely by the *professional* and doctrinal assumptions of its time, Holmes' famous dissent is rather unconventional,<sup>200</sup> although, as Barry Friedman has recently pointed out, it resonated quite well with the *political* views of many contemporary Populist and Progressive thinkers.<sup>201</sup> Put in today's terms, Holmes' dissent in *Lochner* is a bit like Clarence Thomas' concurrence in *United States v. Lopez*<sup>202</sup> in which Thomas argued for a drastic reduction in the federal government's constitutional powers to regulate interstate commerce; his arguments, if accepted, would call into question the constitutionality of much of the modern regulatory state. Thomas's extremely narrow view of federal power, while lying outside the boundaries of conventional professional assumptions, nevertheless has some resonance in conservative political circles and in the larger political culture. Of course once a member of the Supreme Court makes such an argument in the United States Reports, it no longer seems as "off-the-wall" as it had before.

Legal culture has an important place for such "off-the-wall" arguments. They are a form of prophecy. They dare others to think differently about settled questions in a constitutional regime. They try to unsettle what seems fixed and certain. Even if today a particular position seems extreme, the position asserts that it is the true meaning of the Constitution that will come to be recognized in time. "Off-the-wall" arguments cannot wholly be excluded from a legal culture. This is obvious if they are offered by Supreme Court

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in contrast to the more moderate Justices Fuller, Harlan, and Brown).

<sup>199</sup> See *Lochner v. New York*, 198 U.S. 45, 75-76 (Holmes, J., dissenting); FISS, *supra* note 47, at 181 (quoting a November 2, 1893 letter from Justice Holmes to James Bradley Thayer,).

<sup>200</sup> For assessments of Holmes' dissent in the context of professional assumptions of the day, see Charles W. McCurdy, *The "Liberty of Contract" Regime in American Law*, in *THE STATE AND FREEDOM OF CONTRACT* 179-80 (Harry N. Scheiber ed., 1998); G. Edward White, *Revisiting Substantive Due Process and Holmes's Lochner Dissent*, 63 *BROOK. L. REV.* 87, 110-12 (1997); FISS, *supra* note 47, at 179; GILLMAN, *THE CONSTITUTION BESIEGED*, *supra* note 45, at 131.

<sup>201</sup> See Friedman, *Countermajoritarian Difficulty*, *supra* note 39, at 1433-35. Here I make a distinction between professional views about constitutional doctrine and political views about democratic self-government that Friedman does not. However, like Friedman, I think that we exaggerate if we assume that Holmes' views had no support in the legal academy. After all, Holmes' views on legislative power are not all that different from James Bradley Thayer's. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law: Speech Before the Congress on Jurisprudence and Law Reform* (Aug. 9, 1893), 7 *HARV. L. REV.* 129 (1893).

<sup>202</sup> 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (arguing that Court should reject the "substantial effects" test used in Commerce Clause cases since the New Deal).

Justices like Holmes or Thomas, for their mere assertion gains the attention of lawyers. But “off-the-wall” arguments cannot be excluded from the legal culture even if they are offered by non-lawyers like Virginia Minor or Frederick Douglass.<sup>203</sup> Members of social movements with “off-the-wall” arguments have an effect, however small it may be. They make claims about the Constitution and start a conversation. Only the future knows whether the unconventional position, or parts of it, will become accepted. Much turns on whether social movements and political parties get behind a particular interpretation of the Constitution and use their power to push it into public acceptance.

What makes Justice Holmes’ dissent in *Lochner* no longer “off-the-wall,” but rather an example of constitutional orthodoxy, is not the quality of his argument at the time, but rather what happened later on. Political and social forces found his reasoning (and his aphoristic style) useful; parliamentarism and judicial restraint resonated with progressives. Holmes becomes plausible, indeed orthodox, not because his reasoning was flawless – for it was not – but because of the political success of the Democratic Party during the New Deal. Holmes’ opinion becomes an icon of the new legal culture; it is viewed as not only clearly right, but the very paradigm of correct legal reasoning. Politics vindicated a particular “off-the-wall” position, making the contrary views that once were constitutional common sense “off-the-wall.”

Holmes, and not Harlan, was made the hero of *Lochner* in the immediate aftermath of the 1937 revolution because Harlan shared the outmoded logic of limited government and police power jurisprudence. If Harlan looks increasingly sensible today, that is because we have lived through the Rights Revolution and the Second Reconstruction. We understand that judges need ways of balancing competing interests and protecting liberty from legislative overreaching.

Tushnet’s argument about historicism assumes that the more we know about the historical forces that shaped an era, the more we are likely to conclude that things would have ended up pretty much as they did. Judges, doing the best they could do, given who they were, would probably have produced a jurisprudence quite similar to the jurisprudence they actually did produce. In contrast, I offer a dynamic conception of legal culture, which contains a distribution of different views, some quite establishment and others quite unconventional, which contend for space in human minds and fealty in human belief. Put another way, I argue that legal culture is memetic, featuring the competition of bits of culture, or memes, for space in human tools of understanding.<sup>204</sup> I argue that legal culture is simultaneously:

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<sup>203</sup> See Siegel, *Text in Contest*, *supra* note 180, at 334-45 (describing the constitutional arguments of the suffrage movement); Balkin & Levinson, *The Canons of Constitutional Law*, *supra* note 13, at 964-70 (noting the role of non-judicial actors like Frederick Douglass in the constitutional debate over slavery).

<sup>204</sup> BALKIN, *CULTURAL SOFTWARE*, *supra* note 168, at 42-43, 130.

- (1) a distribution of different positions about constitutional meanings;
- (2) a distribution of different judgments about the plausibility or implausibility of alternative constitutional meanings (for example, what do liberals think about the plausibility of conservative positions, and vice versa);
- (3) a struggle over the social meaning of key events (*e.g.*, the 1960's), cases (*e.g.*, *Brown v. Board of Education*), and texts (*e.g.*, the Fourteenth Amendment); and
- (4) a balance of forces that, if sufficiently disturbed by social movement activism and day-to-day politics, may produce a new equilibrium featuring a new constitutional common sense.

To this we may add the sorts of contingencies of history that Tushnet himself would surely acknowledge: a Justice might die suddenly and be replaced by someone with contrary views, or a Justice who did die (or retire) young might survive and stay on for years to take positions very different from those of the person who actually succeeded him or her. Chief Justice Vinson might not have died of a heart attack to be succeeded by Earl Warren; Abe Fortas might have weathered scandal and become Chief Justice. Hubert Humphrey might have won the 1968 election and replenished the Supreme Court with Great Society liberals. The list of contingencies is potentially endless.

What these contingencies have in common is that they feature shifts in who staffs key points of power and influence in a legal culture. Not every person in a legal culture is similarly situated in the degree of influence and authority he or she possesses. For some people, it makes a great difference what they think, because they are a sitting Justice, because they are an important opinion leader, or because they are a key member of a rising social movement or a dominant political party. These nodal points of authority and influence are architectural features of a legal culture that undergird the distribution of opinions and opinions about opinions. The network of nodal figures and institutions helps determine which ideas and positions ascend into plausibility and dominance and which are cast into the dustbin of history. It follows that contingencies in who staffs these key nodal points in the network of legal culture, these key positions of power and influence, may significantly affect which legal interpretations become ascendant.

When we combine these events with the characteristics of legal culture I have outlined above we must reject Tushnet's strongly deterministic view of legal culture. Even if we assumed that any particular individual in a key position of power (for example, an antebellum Southern Justice) might do pretty much what he actually did, the constellation of political forces that shape the distribution of positions in legal culture and that place key people in key positions to influence legal culture may change significantly depending on slight shifts in initial conditions.

We know three things about legal cultures. First, they are not monolithic,

but rather a *distribution of different positions and positions about positions*. Second, they are *dynamic*, in the sense that people of different views are constantly pushing and pulling, trying to convince others to join them, with varying degrees of success. Third, legal cultures feature *nodal points of power and influence*, which, if staffed by people with slightly different abilities, or slightly different views, can have important and significant effects.

Tushnet's analysis of legal historicism works from the entirely reasonable premise that it is hard to criticize decisions made within a past legal culture as wrongly decided if larger social forces shaping legal culture greatly constrained the possible outcomes. I agree with this basic assumption. But my analysis of legal culture argues that the legal culture of a particular time offers considerably greater resources for justifying different legal outcomes than Tushnet suggests. Therefore it is appropriate for us to hold a previous generation of legal decision-makers responsible for what they did or failed to do.

Once again, if we think about the contemporary legal culture we inhabit, we recognize a distribution of different views, as well as the importance of particular institutions like political parties and social movements, and the significance of key opinion makers and other nodal points of authority and influence. Something fairly similar was probably true of legal cultures in the past. However, many of the diverse and variegated features of a past legal culture are lost to memory, and all that we have are the remnants of what happened, rather than a full account of its potentialities. The evidence that we do have tends to bias us in a particular direction – toward coherence and determinacy. In particular, it becomes harder to view key decisions in the past (key from our perspective) as “off-the-wall” in their own time simply because these were the decisions that actually occurred and inevitably shaped the world we live in today. Thus, to future years, key decisions like *Lochner v. New York* may look characteristic rather than idiosyncratic and unrepresentative. Yet we have no problem with saying that particular decisions of our own era – for example, *Bush v. Gore* – are wrongly decided or even “off-the-wall,” because we are participants in the legal culture. To be sure, historians fifty years from now may sagely inform us why *Bush v. Gore* was inevitable and characteristic of the polarized political discourse of the late twentieth century. But for those of us who lived (and worried and squabbled and fretted and argued) through the 2000 election, we understand, in a way that future historians perhaps will not, that *Bush v. Gore* was not the best or only thing our legal culture could produce. It was no sense inevitable or characteristic of our legal culture. Rather it became part of our legal culture, and a definitive part, because we let it become so, because certain people chose to take a particular tide in the affairs of human kind and others let that tide pass them by. If *Bush v. Gore* becomes characteristic of the legal culture of the late twentieth century, it will be because the future remembers what it wants to remember and perpetually remakes the past in its own image.

If my account of legal culture is correct, slight changes in the configuration

of a legal culture might have important effects on its trajectory. Thus, we might ask: if events were slightly different, if a different group of mainstream lawyers occupied nodal positions of authority and influence, if social movements and opinion makers had slightly different views or slightly different resources, would the resulting legal culture and the decisions it left behind have been different? Call this thought experiment the slight variation of initial conditions.<sup>205</sup> If we believe that slight variation of initial conditions matters to the trajectory of a legal culture, then we may say – with all the confidence that is possible in an uncertain world – that a particular decision might have been different; that not only were the resources available to produce a different result, but the causal story that would produce these resources was also possible. That is one plausible way to think about whether as individuals we might have done things differently in the past, and it is an equally plausible way for us to think about the products of the legal culture as a whole.

To be sure, a thoroughgoing determinist might object that every single event – including who staffed the relevant nodal points of power and influence – was causally determined and so the causal story could not have been different. Even a determinist, however, needs to have a coherent language of moral responsibility and blame. Given that all events are equally caused, we need to make sense of our judgments about for which events people should be held responsible and for which events we will consider people blameless or excused. Imagining what would have happened with a slight variation in initial conditions helps us to make sense of these types of judgments of responsibility, blame, and excuse. It also helps us make sense of judgments of responsibility about past legal cultures. Roughly speaking, we can say that the Supreme Court took a wrong turn in *Lochner* for which we might hold it responsible only if the legal culture provided adequate resources for a different decision and only if a slight variation in the legal culture might have produced decision-makers who would have employed those resources in a better way.

But of course, this is only one half of the response to Tushnet's account of legal historicism. I have argued that the legal culture could have produced

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<sup>205</sup> Cf. DANIEL C. DENNETT, *FREEDOM EVOLVES* 75-77, 88-95 (2001) (making an analogous argument about human agency and determinism). Tushnet offers a similar variation of initial conditions argument for a somewhat different purpose: “[w]hat if my experiences had been just a little different from the ones they actually were? . . . I can’t be confident that I would hold the views I do, or hold those views with the same degree of attachment.” Tushnet, *Self-Historicism*, *supra* note 169, at 776. Hence, Tushnet suggests, historicism should make us less rigid in our views and more open to rational thought and discussion. *Id.* at 777. That is to say, he argues that adopting a historicist sensibility about one’s own views empowers one’s imagination, because it is “a type of enlightenment, restoring the role of reason and choice in political deliberation.” *Id.* I offer my argument to suggest why a legal culture has greater possibilities for transformation, so that one may appropriately contend that decision-makers in the past took a wrong turn for which they can be held responsible.



something other than *Lochner v. New York*, or that, at the very least, that it makes sense for us to hold that legal culture responsible for having produced *Lochner*. The other half of the inquiry is whether the legal culture of that day – and, in particular, the Supreme Court – should have produced something different. To answer that question we must engage in a sympathetic appraisal of the legal culture at the time, in all of its diversities. We must ask whether that culture, armed with the tools of understanding of its time, could have produced something better as judged according to those tools of understanding. Making this sort of judgment, no matter how sympathetic to the understandings of the past, inevitably involves our own judgments of what is just and unjust, better and worse. But it need not consist solely of those judgments.

For example, it is not difficult, I think, to conclude that Harlan’s approach in *Lochner* was available (after all, it commanded three votes). If we want to say that it was also better, a more successful legal performance, a more admirable product of the contested legal culture of early twentieth century America, we must bring to bear our present day judgments about what this admirableness consists in. There is nothing wrong in that; if it is anachronistic, it is an anachronism necessary to historical understanding. The fault is in assuming that the best version of *Lochner v. New York* is the one that most closely matches our own constitutional common sense. Put another way, the mistake is in automatically assuming that *Lochner* was wrongly decided because the right way to decide it was Holmes’ way, which seems more familiar to us in light of the New Deal.

If *Lochner* was wrong the day it was decided, it will not be for any of the reasons that we law professors continually offer for why it was wrongly decided. It will not be because the Justices failed to recognize the artificiality of common law baselines. It will not be because the Justices failed to understand that the proper role of courts was to police the democratic process. And it will not be because the Justices did not realize that social and economic legislation is to be upheld unless it is rationally related to some set of facts that a rational legislature might have believed. Rather, if *Lochner* was wrong the day it was decided, it will be because those who lived in that time, enabled by the tools of understanding that their legal culture offered them, could have done better for themselves. Doing better would have shaped, however subtly, the legal culture they lived in. That improvement, in turn, might have had important ripple effects in the trajectory of the legal culture they inhabited. Indeed, if they had done a better job, we might well not be living in the legal culture we inhabit today.